Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion

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NOTE

Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion

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In the 1976 Copyright Act, Congress extended the term of copyright protection for authors that had existed under the 1909 Act. Congress, however, strengthened the reversion feature of the 1909 Act, which returned any previously transferred rights to the author or her successors. In this note, R. Anthony Reese examines each Act's provisions as to the length of the copyright term and reversion through the eyes of two very different theories of property rights: libertarian Lockeanism and rent-theory Lockeanism. Mr. Reese submits that a libertarian Lockean would view intellectual property rights as pre-political, natural rights which the state exists to protect. Conversely, he proposes, a rent-theory Lockean would view intellectual property rights as dependent upon the state and justified only to the extent that they compensate an author for the sacrifice involved in the creation of a copyrightable work. Mr. Reese concludes that although the libertarian Lockean may find the 1976 and 1909 Acts more objectionable than would a rent-theory Lockean, both Copyright Acts reflect a view of intellectual property that combines aspects of both philosophies.

In 1976, Congress ended a twenty-year reevaluation of the goals and methods of United States copyright law and substantially revised that law for the first time since 1909.[1] The new law significantly changed the length and structure of the term of copyright protection. The 1909 Copyright Act entitled an author to exclusive rights in her work for at most fifty-six years, but, like every

* J.D. candidate, 1995, Stanford Law School. I would like to thank Professors Barbara Fried and Margaret Jane Radin for their excellent introduction to the field of property theory and for their insights into how general theories of property might apply to copyright law. I am indebted to Professor Paul Goldstein for the opportunity to immerse myself in a wide variety of copyright issues through assisting in his research. I would also like to thank Robin Packel and the Notes Staff of the *Stanford Law Review* for their research and editorial assistance.

1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1993)). The revision process leading to the 1976 Act is generally considered to have begun with a series of studies started in the Copyright Office in 1955. *See* SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 1ST SESS., *Foreword* to COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS PURSUANT TO S. RES. 53, STUDIES 1-4, at iii (Comm. Print 1960).

United States copyright act since 1790, granted those rights in two separate and consecutive installments: an original term and a renewal term.[2] The 1976 Copyright Act departed strikingly from this tradition: It abolished the original and renewal terms of the 1909 Act and instead generally grants an author copyright protection for a single term lasting until fifty years after her death.[3] A closer examination of the 1976 Act's provisions, however, also reveals substantial continuity with the two-term system of its predecessors. Within the new single term, the 1976 Act in fact retains a primary feature of the renewal system: the reversion to an author (or her successors), midway through the term, of any rights she has previously transferred.

The provisions of the 1909 and 1976 Acts on the copyright term represent legislative answers to questions about the extent of an author's property in her own works. Such questions about intellectual property rights, perhaps more than similar questions about other types of property, seem to evoke a strong intuition that an individual is entitled to ownership of that which she creates through her own labor, an intuition expressed and defended by John Locke, the foremost figure in the history of Anglo-American thinking about property rights. Locke's philosophical treatment of this intuition, however, provides no obvious answers to intellectual property questions. Locke, after all, wrote primarily about tangible property, and his theory might not simply apply *mutatis mutandis* to intangible intellectual property. Even if intellectual property can be explained in Lockean terms, though, Locke's basic premise that an individual has an exclusive entitlement to that which she creates with her own labor has led different property theorists to very different conclusions about the nature and extent of the entitlement and thus to very different answers to questions about an author's rights in her own works.

One theory, a libertarian interpretation of Locke, holds that an individual's property rights in the things she creates through her labor are prepolitical, natural rights and that the state therefore cannot alter or abolish those rights. Indeed, on this view, the state owes its existence largely to the need to protect an individual's property rights against depredation by others. Robert Nozick, a

2. The length of each term varied from 14 years under the 1790 Act to 28 years under the 1909 Act. Act of May 31, 1790, ch. xv, § 1, 1 Stat. 124, 124; Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080. For renewal provisions under intervening copyright acts, see Act of Feb. 3, 1831, ch. xvi, §§ 2-3, 4 Stat. 436, 436-37 (providing for an original term of 28 years and renewal of 14 years); Act of July 8, 1870, ch. ccxxx, § 88, 16 Stat. 198, 212-13 (same). The concept of protecting copyright in two separate, consecutive terms dates back to the earliest Anglo-American copyright act, the Statute of Anne, 8 Anne, ch. 19 (1710), which granted authors a 14-year copyright and, if the author was living at the expiration of that period, a second term of 14 years.

Throughout this note, I use the term "author" not in the popular sense of one who writes a literary work but in its copyright sense of "he to whom anything owes its origin; originator; maker." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (internal quotation marks omitted). Similarly, I use the term "work" to cover all types of works subject to copyright. Under the 1976 Act, these include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. 17 U.S.C. § 102(a) (1988). When describing a work as "creative," I refer only to the "extremely low" level of creativity required for copyright, and not to any higher artistic standard. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

3. 1976 Copyright Act, § 302, 90 Stat. at 2572. The Act makes some exceptions to the life-plus-50-year term. *See* note 40 *infra*.

prominent contemporary exponent of libertarian Lockeanism, summarized this view in his book *Anarchy, State and Utopia*:

> Individuals have rights . . . [s]o strong and far-reaching . . . that they raise the question of what, if anything, the state and its officials may do. . . .
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> . . . [A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; . . . any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified.[4]

Libertarian Lockeans have often viewed the traditional Anglo-American common law regime of property rights and freedom of contract as exemplifying the minimally justifiable state.

A very different theory of an individual's entitlement to the fruits of her labor is what Professor Barbara Fried has termed rent-theory Lockeanism.[5] While rent theory had a large influence on British political thought in the early part of this century, its influence in the United States was more attenuated, with the notable exception of the legal realist and institutional economist Robert Hale. Rent theorists agree that an individual has a right in the property she creates by her own labor, but sharply dispute the libertarian Lockean view of the extent of this right. While rejecting the libertarian reading of Locke that found the traditional Anglo-American constellation of legal property rights to be "natural," prepolitical, and protected from state interference, Hale and other rent theorists, like the libertarian, turned to Locke to determine how the state *should* define property.[6] Unlike the libertarians, however, rent-theory Lockeans believe that the only property right that can be deduced from Locke's premise of labor entitlement is a right to that portion of the property which represents the sacrifice the individual has made in its creation; anything more is not attributable to the individual, and therefore the individual is not entitled to it as matter of right.

This note considers how libertarian and rent-theory Lockeanism, as expounded in the writings of Nozick and Hale, would answer questions about the

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4. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix (1974).

5. Professor Fried coined the term in her study of Robert Hale. *See* BARBARA FRIED, ROBERT HALE AND PROGRESSIVE LEGAL ECONOMICS (forthcoming, Harvard University Press) (on file with the *Stanford Law Review*).

6. Hale is perhaps best known for his positivist critique of the libertarian Lockean notion of "natural rights": his argument that property rights are entirely dependent on the state's existence and its willingness to define and enforce such rights. One might naturally have expected that positivist critique, coming from someone with Hale's Progressive social welfarist sympathies, to lead him to embrace a utilitarian-based theory of property rights, in which the state defines such rights so as to maximize the overall social welfare. But Professor Fried has noted that Hale's property theory, "whether from conviction, intellectual predilections or a prudential judgment as to what would prove most persuasive to the unconverted," eschewed straightforward utilitarianism and instead remained "largely internal to the natural rights tradition it . . . critqu[ed], grounded on the Lockean imperative that people have an exclusive right to that which they have created with their own labor." *Id.* (manuscript ch. 3, at 4). I draw on both the positivist and the rent-theory strands of Hale's thinking in my analysis, for convenience referring to the two together as "rent-theory Lockeanism." Neither, however, logically entails the other. Just as Hale could have combined his positivism with a straightforward utilitarianism rather than with a rent-theory reading of Locke, so too he could have grounded his rent-theory vision of distributive justice in a Lockean notion of natural, prepolitical rights.

duration of an author's property rights in her works, and how those answers would correspond to those given by Congress in the 1909 and 1976 Acts. To lay the foundation for this analysis, Part I considers how these two theories would view copyright generally. Parts II and III then use these theories to evaluate provisions on the length and structure of the copyright term and on the reversion of rights to authors under the 1909 and 1976 Acts.

I. TWO LOCKEAN VIEWS OF COPYRIGHT

A. *Libertarian Lockeanism*

A libertarian Lockean analysis of the duration and reversion of copyright requires answers to antecedent questions of how an author becomes entitled to property rights in her work and what precisely those rights are in a Nozickian minimal state. Nozick asserts that two basic principles "exhaustively cover the subject of justice in holdings": A property right is justly owned if it was acquired in accordance either with the principle of justice in original acquisition or with the principle of justice in transfer.[7] Thus, any "entitlement" an author has to ownership rights in the works she creates must apparently arise because she has acquired that entitlement in accordance with the principle of justice in original acquisition. Although Nozick expressly refuses to formulate this principle,[8] his discussion entitled *Locke's Theory of Acquisition*[9] suggests, despite the many questions he poses, that Nozick's formulation would share much with Locke's theory, which Nozick summarizes as positing that "property rights in an unowned object . . . originat[e] through someone's mixing his labor with it."[10] As Locke put it:

> Whatsoever then [a Man] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. . . . at least where there is enough, and as good left in common for others.[11]

On a purely physical level, an author mixes her manual labor (writing, painting, photographing, etc.) with the material resources (paper, canvas, film, etc.) required to fix the work in tangible form, and therefore, by libertarian Lockean principles, makes at least the physical object which embodies the work into her own property.

While Locke had such tangible property in mind, his theory seems capable of explaining the acquisition of intangible intellectual property as well. An

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7. NOZICK, *supra* note 4, at 151.

8. *Id.* at 150.

9. *Id.* at 174.

10. *Id.* Other evidence also supports the view that Nozick's principle would resemble Locke's theory:

> The central core of the notion of a property right in X . . . is the right . . . to choose which of the constrained set of options concerning X shall be realized or attempted. The constraints are set by other principles or laws operating in the society; *in our theory, by the Lockean rights people possess (under the minimal state).*

Id. at 171 (emphasis added) (footnote omitted).

11. JOHN LOCKE, *An Essay Concerning the True Original, Extent, and End of Civil Government, in* TWO TREATISES OF GOVERNMENT ch. V, § 27 (Peter Laslett ed., 1988) (1689).

author mixes her mental labor with cultural resources that might well be described as "belong[ing] to Mankind in common"[12] in the same way that the Earth's physical resources in Locke's view were originally common property. This "intellectual commons" would include resources such as language and symbolism; literary, visual, and musical traditions and conventions; the history of ideas—in short, everything that can be described as "culture" in both the artistic and anthropological senses. An author's act of creation may be seen as the mixing of her mental labor with resources drawn from this "cultural state of nature" in order to produce a new work and, in the process, acquiring property rights in that work beyond the right of ownership in the tangible object she creates.

Even if culture is viewed not as a commons but as subject to individual ownership, an author can still be entitled to a property right in her work under Nozick's principles: She has mixed her labor with cultural resources she justly owned, not through appropriation from the intellectual commons but through acquisition in accordance with the principle of justice in transfer. Although Nozick declines to formulate this principle as well, he does explain that "[w]hoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it."[13] Thus, one can acquire the right to use pieces of the intellectual commons that have already been "enclosed" by others. For example, when an aspiring playwright buys a ticket to a performance of *Romeo and Juliet*, the purchase price might be seen as entitling her not merely to watch the play, but also to take away with her the text's ideas and the production's interpretation and to mix them with her own mental labor to produce a new work. Similarly, the painter who pays to view a museum's collection (or who accepts the museum's gift of free entrance) acquires the right to make use of what she sees there and how she perceives it when next she puts brush to canvas.[14]

While Nozick's principles of justice in acquisition and transfer can thus explain how an author is entitled to ownership of her work, a more difficult question then arises: *What* precisely does she own? If the playwright's ticket to *Romeo and Juliet* entitles her to use in her own work the ideas presented in and provoked by Shakespeare's tragedy, might it not entitle her to copy his exact words as well? And might not my purchase of one of the playwright's texts entitle me not merely to read the play and use the ideas I find in it, but also to make and sell further copies of the play, or to perform it on stage and

12. *Id.* § 26.

13. NOZICK, *supra* note 4, at 160.

14. As to cultural resources more fundamental than, for example, Shakespeare's ideas, a writer might be said to be entitled to her linguistic skills because she acquired them in accordance with the principle of justice in transfer. Her parents freely gave of their knowledge as native speakers. The contributions of her teachers were a transfer from the state and her parents, who shared the costs of the teachers' salaries, the school's facilities, and her expenses; at higher levels of education, she herself may have paid for the knowledge she acquired. She has also paid other writers, through the purchase price paid for their books, for their contributions to her linguistic and literary abilities, though not, under our copyright law, for the right to use their particular arrangements of words.

charge admission? Since Nozick holds that only "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified,"[15] a law that prevents my copying or performing the play would seem justified only if my doing so either violates a specific term of the sale contract or constitutes "theft" of some right of the author that was not transferred to me in the sale.

Does the playwright, by mixing her mental labor with the cultural resources she has justly acquired (either through original acquisition or through transfer), have such a right against my copying or performing her play? This question is difficult to answer based only on what can be deduced about Nozick's unarticulated principles of justice in acquisition and in transfer. To use the common legal metaphor for property ownership, we may be able to say with some confidence that the playwright does own the bundle of sticks representing her play, but we can say very little about which sticks are in the bundle. At least three possibilities seem obvious. First, at the very least, an author's just acquisition of her work entitles her to the same rights in its physical embodiment as those enjoyed by any owner of tangible personal property: No one would be allowed to steal or defraud her of her manuscript, canvas, or negative. Of course, this basic property right gives an author no protection against a purchaser copying or performing her work. The other two possibilities would find in an author's bundle of sticks some property right in the work's mental content, rather than just its physical embodiment. The weaker of the two would resemble a common law copyright, which protected an author's right to the intangible intellectual property in her work, but only until first publication.[16] The stronger view of the extent of an author's entitlement, resembling a modern statutory copyright, would recognize an author's exclusive right to control a work's use for some fixed period of time after publication.[17] As discussed in Parts II and III, libertarian Lockeanism would seem to recognize an author's ownership not merely of the physical object in which the work is first embodied but also of the work's intellectual property, yet the scope of that intellectual property right does not emerge clearly from Nozick's entitlement theory of holdings, at least in the absence of more extensive elaboration of the principles of justice in acquisition and in transfer.

B. *Rent-Theory Lockeanism*

The questions of how an author becomes entitled to property rights in her work, and the precise extent of those rights, pose far fewer difficulties for rent-

15. NOZICK, *supra* note 4, at ix.

16. Some evidence suggests the common law copyright originally protected an author's property in her work in perpetuity. *See* note 66 *infra*. Common law copyright was largely abolished in the United States by the 1976 Act, which provided statutory protection of limited duration for both published and unpublished works; state common law copyright remains available only for the protection of unfixed works and of works not within the subject matter of federal copyright. *See* 17 U.S.C. § 301 (1988); PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 15.4 (1989).

17. *See e.g.*, 17 U.S.C. § 106 (1988). For a discussion of whether this strong view of an author's entitlements would include the right to control the ideas in a work, see text accompanying notes 62-65 *infra*.

theory Lockeanism, such as that embodied in the work of Robert Hale. Hale's view of property rights corresponds much more closely than does Nozick's libertarian Lockeanism to the traditional American view of copyright, which Professor Paul Goldstein has characterized as "center[ed] on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers."[18] While Nozick views all property entitlements as dependent only on the justice of their original acquisition and subsequent transfers, Hale's rent-theory Lockeanism contains a strong positivist element that denies the existence of prepolitical property rights which people are entitled to enforce against the state.[19] Hale explained that property rights exist only because the state enforces them: "The fact is that in 'protecting property,' the law is intervening to restrict what would otherwise be the liberty of the non-owner [to use the owner's property]; [the law] also restricts the owner's liberty in respect of other property owned by the non-owners of this property."[20] The law restricts the liberty of nonowners not merely in order to enforce some "existing" rights such as those that Nozick would claim are acquired through the mixture of one's labor with justly acquired resources. As Professor Fried has explained, for Hale "such rights depend on the willingness of the state not only to enforce them, but to articulate them in the first instance,"[21] since "until the state says something, in its official or unofficial guise, [property rights] are (conceptually) nothing at all."[22] Hale illustrated this point by contrasting a person's property rights with her right not to be assaulted:

> The requirement that I refrain from striking another man's face is a complete statement of my duty in the matter. The law does not have to make a further statement defining what his face is. But the statement that I must not make use of Jones's automobile does not suffice to tell me whether I have a duty, and Jones a right, which will be violated if I drive off without Jones's permission in a particular car which is parked in the street. Before concluding that my act violates Jones's right, the law must furnish another premise in addition to the major premise that I may not use Jones's property without his permission. It must also furnish a minor premise that the particular car in which I drove was Jones's property. *It is Jones's property only by virtue of the law*, whereas Jones's face which I may have struck is known to be his face without any legal definition.[23]

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18. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 168-69 (1994). Goldstein notes that while commentators contrast this "American culture of copyright" with a "European culture of copyright [that] places authors at its center, giving them as a matter of natural right control over every use of their works that may affect their interests," these two cultures of copyright share a great many similarities. *Id.* at 168, 170.

19. FRIED, *supra* note 5 (manuscript ch. 3, at 11).

20. Robert Lee Hale, *Economic Theory and the Statesman, in* THE TREND OF ECONOMICS 191, 215 (Rexford Guy Tugwell ed., 1924).

21. FRIED, *supra* note 5 (manuscript ch. 3, at 11).

22. *Id.* (manuscript ch. 3, at 13).

23. Robert L. Hale, *Our Equivocal Constitutional Guaranties,* 39 COLUM. L. REV. 563, 587-88 (1939) (emphasis added). Professor Fried has noted that Hale's argument is "a bit confused as to the 'natural' status of Jones's face." She notes that while "Jones's attachment to his face may make inalienability a physical impossibility . . . and hence a de facto legal right . . . it does not guarantee Jones any legal rights of ownership beyond that." Fried suggests that "[p]erhaps the unexpressed thought underlying Hale's example is that Jones's physical relationship to his face and to his other bodily parts, *unlike*

The traditional American view of copyright as entirely a creation of statutory grant is remarkably consistent with Hale's positivism. As early as 1834, the United States Supreme Court articulated the view that an author's entitlement to a copyright in her works rests solely on the congressional declaration of her rights: "Congress . . . by [the 1790 Copyright Act], instead of sanctioning an existing right . . . *created* it. . . . This right . . . does not exist at common law—it originated, if at all, under the acts of congress."[24] For Hale, then, the question of why an author is entitled to property rights in her works is easily answered: because the state has said she is.

Having located the source of an author's rights in the state's positive legal enactments, rent-theory Lockeanism still faces the question of which particular property rights a state should enact. Hale rejected his laissez-faire contemporaries' answer that Lockean principles entitle an owner to the full exchange value she might obtain for her property in the "free" market. He argued both that the existing market is not free and that Lockean premises provide no basis for entitling a person to the exchange value in that market. In discussing the price of labor, for example, he explained:

> [There is no] economic reason for supposing that there is something "sacred" or even "natural" (i.e., not law-made) in the pre-existing exchange value of the labor. It depended, among other things, on the supply of labor employed, and that in turn depends in part on legal arrangements. Were land distributed in some system of peasant proprietorship, the supply of men seeking jobs working for others would be less than otherwise.[25]

Hale also framed the argument in the context of regulated utilities:

> The argument for letting the regulated company keep whatever earnings result from a rate fixed at a point above cost, is an argument which assumes that in some manner the company has "produced" these earnings, and that some "natural law" forbids the government to deprive people of what they have produced. . . . The income derived by the company which charges the price above cost or for that matter the income collected by any property owner, is not something created by that owner, but something squeezed out of others by a law-made pressure.[26]

Professor Fried has generalized Hale's views, concluding that he believed that

> [t]hat portion of income that compensated individuals for the sacrifice entailed in the production of wealth ought to be protected from government incursion [while] any remaining value was the moral property of the community, to be appropriated and redistributed as it saw fit in the interests of the common good.[27]

The "sacrifice" for which an individual should be compensated under Hale's reading of Locke encompasses more than mere reimbursement of actual outlays and includes a fair return on investment as the amount necessary to encourage

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his incorporeal relationship to his car, carries with it a strong, universally shared intuition as to certain basic legal rights that ought to go along with it." FRIED, *supra* note 5 (manuscript ch. 3, at 13 n.40).

24. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661-63 (1834) (emphasis added).

25. Robert L. Hale, *Political and Economic Review*, 10 A.B.A. J. 259, 259 (1924).

26. Hale, *supra* note 20, at 214-15.

27. FRIED, *supra* note 5 (manuscript ch. 3, at 6).

people to make the sacrifice in the first place. He noted that "[a] certain degree of inequality of property rights seems essential if the pecuniary incentives to production are to be maintained."[28]

Hale's rent-theory view of Lockean property entitlements justifies the traditional American view of copyright as a balance between the ultimate goal of encouraging authorial creativity in order to benefit the public at large and the particular method of encouraging the production of creative works by granting authors a limited monopoly that restricts public access to the works produced.

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors."[29]

Traditional American views of copyright, then, correspond to both aspects of Hale's rent-theory Lockeanism: his positivism and his interpretation of Locke as entitling a property owner only to the income required to compensate her for producing the property.

II. LENGTH OF COPYRIGHT TERM

In considering how both libertarian and rent-theory Lockeanism would evaluate the copyright term under the 1909 and 1976 Acts, it will be useful to examine separately two distinct features of the term: the length of time for which an author's work is protected, and the reversion to an author, at some point during the term, of rights she had previously transferred. Part II considers the length of the term, looking both at the actual number of years for which an author owns exclusive rights in her works and at whether the term is unitary or bipartite. Part III examines copyright's reversionary mechanisms.

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28. Robert L. Hale, *Political and Economic Review,* 9 A.B.A. J. 39, 39 (1923).

29. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)); *see also* Stewart v. Abend, 495 U.S. 207, 228 (1990); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984). This view is a venerable one. The Constitution expressly acknowledges this balance, granting Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Lord Mansfield expressed this view of copyright in 1785 in *Sayre v. Moore*:

> [W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Cary v. Longman, 102 Eng. Rep. 138, 140 n.b (1801) (quoting *Sayre v. Moore*).

A. *The 1909 Act*

The 1909 Copyright Act granted an author a copyright that lasted "for twenty-eight years from the date of first publication" of her work and also allowed the "renewal and extension of the copyright . . . for a further term of twenty-eight years."[30] This second term was available only when an author applied to the Copyright Office for renewal "within one year prior to the expiration of the original term of copyright"; in the absence of such an application, the copyright expired at the end of the original twenty-eight-year term.[31]

In setting the maximum length of the copyright term, Congress wanted to allow an author to claim copyright in her works for her entire lifetime: "The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age, when, perhaps, he needs it the most."[32] Congress sought to achieve this goal in 1909 by doubling the length of the previous act's renewal term from fourteen to twenty-eight years, thus extending the maximum copyright term to fifty-six years. This approach did not guarantee protection for an author's entire lifetime, as would have been the case if Congress had adopted proposals to grant copyright for the author's lifetime plus thirty or fifty years, but, since life expectancy in 1909 was "in the neighborhood of 56 years"[33] and few authors had works to copyright at birth, the average author would not outlive her copyright under the 1909 Act.[34]

Congress rejected a formal extension of the copyright term to an author's lifetime (or beyond) in part because it desired to continue dividing copyright protection into two terms and conditioning the grant of a renewal term on a work's reregistration in order to allow authors the opportunity to exploit their works for a relatively long period of time while ensuring that works with little commercial value would pass into the public domain in a much shorter period.[35] During the hearings preceding the adoption of the 1909 Act, legislators

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30. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

31. *Id.* Separate formalities for securing the renewal term in a copyrighted work had been required since the 1790 Act. § 1, 1 Stat. at 124.

32. H.R. REP. No. 2222, 60th Cong., 2d Sess. 14 (1909) (noting also that the maximum 42-year term under the 1870 Act was "in many cases . . . insufficient" to achieve this goal).

33. H.R. REP. No. 1476, 94th Cong., 2d Sess. 135 (1976).

34. Some authors, though, did outlive their copyrights under the 1909 Act, even when the term of protection for works initially covered by that Act was extended from 56 to 75 years by the 1976 Act: "This happened to Irving Berlin, who died in 1989 at the age of 101; 'Alexander's Ragtime Band,' one of his early hits, had already fallen out of copyright protection." Ralph Blumenthal, *A Rights Movement With Song at Its Heart,* N.Y. TIMES, February 23, 1995, at C13.

35. Evidence presented during the hearings leading to the adoption of the 1909 Act suggests that the pre-1909 renewal structure very effectively achieved the goal of hastening the entry of works into the public domain: "[T]he records of the copyright office show that last year but 2.7 per cent of the copyrights completing their original term of twenty-eight years were thought by the authors of sufficient value to renew them . . ." *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright,* 59th Cong., 1st Sess. 183 (1906) (letter of Charles W. Ames, representing United Typothetae of America) [hereinafter Ames Letter]. While the proportion of works registered for renewal rose under the 1909 Act, fewer than 15% of eligible works were registered for renewal in 1959. Barbara A. Ringer, *Renewal of Copyright,* Study No. 31 *in* SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS,

considered replacing the 1870 Copyright Act's bipartite term (a twenty-eight-year original term followed by a fourteen-year renewal term) with a single term of the author's life plus a fixed number of years, but "[s]entiment was . . . expressed in favor of renewals as a device for adjusting the term in accordance with the commercial value of the work, so that 'undeserved or undesired extensions of term' would not be conferred upon those 'hundreds of thousands of copyrights of no pecuniary value to the owners.' "[36] In 1907, even a bill that would have granted copyright for the lifetime of the author plus thirty years conditioned the continuance of that term on the copyright owner's filing a renewal claim.[37]

The drafters of the 1909 Act eventually chose to retain the bipartite term: "A very small percentage of the copyrights are ever renewed. All use of them ceases in most cases long before the expiration of twenty-eight years. In the comparatively few cases where the work survives the original term the author ought to be given an adequate renewal term."[38] By putting most works into the public domain after twenty-eight years, rather than after fifty-six years, the two-term structure of the 1909 Act, like its predecessors, reflected the traditional American conception of copyright as a balance between the need to provide the public with creative works and the need to provide incentives for authors to produce such works. The bipartite term increased the availability to the public of the creative works encouraged by the copyright laws at virtually no cost to authors, since any author desiring continued protection could obtain it by filing for the renewal term.[39]

B. *The 1976 Act*

The 1976 Act abolished the two-term structure of copyright protection for works created after 1978 and provides a single term, generally the lifetime of the author plus fifty years.[40] Abandoning the bipartite term that had existed since the beginning of American federal copyright in 1790 was perhaps the most significant change made by the 1976 Act.[41] The reasons for the change,

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TRADEMARKS AND COPYRIGHTS PURSUANT TO S. RES. 240, STUDIES 29-31, 107, 222 (Comm. Print 1961). Another purpose for the bipartite term was as a mechanism for the reversion of rights to the author. *See* text accompanying notes 89-97 *infra*.

36. Ringer, *supra* note 35, at 117 (quoting Ames Letter, *supra* note 35).

37. *Id.* The committee reports explain that "the purpose of adding the renewal device was to allow the large bulk of copyrighted works to fall into the public domain at the end of a short definite term, while permitting a much longer term for works of lasting value." *Id.* at 117-18.

38. H.R. REP. NO. 2222, *supra* note 32, at 14.

39. In fact, the renewal formalities did impose some costs on authors. *See* text accompanying note 69 *infra*.

40. 17 U.S.C. § 302(a) (1988). Anonymous works, pseudonymous works, and works made for hire are protected for 75 years from publication or 100 years from creation, whichever is shorter. 17 U.S.C. § 302(c) (1988).

41. PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 704 (rev. 3d ed. 1993) ("One of the 1976 Act's main innovations was to alter the duration of copyright . . . to a term measured by the life of the author plus 50 years."). The House Report accompanying the bill notes that "the adoption of a life-plus-50 term was by far [the] most important legislative goal [of authors] in copyright law revision" and that "[t]he Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill." H.R. REP. NO. 1476, *supra* note 33, at 133.

according to the Act's legislative history, included: 1) increased life expectancy, which made the 1909 Act's term too short "to insure an author and his dependents the fair economic benefits from his works";[42] 2) the simplicity of the single term;[43] 3) the elimination of the "substantial burden and expense" of renewal formalities;[44] 4) the 1976 Act's elimination of authors' perpetual common law copyright in unpublished works, for which a life-plus-fifty-year term was "no more than a fair recompense";[45] and 5) "[t]he need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world."[46]

The 1976 Act's single term obviously furthers the goal, which had also motivated Congress in 1909, of extending copyright protection for an author's entire lifetime; no author can outlive a copyright that extends for a life-plus-fifty-year term. The 1976 Act's drafters expressly advanced this justification for the single term, discussing life expectancy in some detail and concluding that "[a] copyright should extend beyond the author's lifetime, and judged by this standard the present term of 56 years is too short."[47]

Legislators recognized, however, that the move to a unitary term meant relinquishing the bipartite's term crude measurement of the length of copyright protection in proportion to a work's commercial value and noted concerns that

> since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50[-]year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions.[48]

While some unrenewed works are "of practically no value to anyone," others "have scholarly value to historians, archivists, and specialists in a variety of fields."[49] On the other hand, changes in communication since 1909 had "substantially lengthened the commercial life of a great many works."[50] Moreover, the drafters argued, "[a] short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years."[51] In the end, Congress in 1976 struck the author-public

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42. H.R. REP. No. 1476, *supra* note 33, at 134.

43. The legislative history notes that the single term would eliminate most of the uncertainty surrounding the concept of "publication," the crucial event in calculating copyright terms under the 1909 Act, and would substitute "a much simpler, clearer method for computing the term" based on the "definite, determinable event" of an author's death. In addition, copyright in all of an author's works would expire simultaneously. *Id.*

44. *Id.*

45. *Id.* at 135.

46. *Id.* Most importantly, Article 7(1) of the Berne Convention for the Protection of Literary and Artistic Works requires that signatories grant copyright protection for the life of the author plus 50 years. Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971, 828 U.N.T.S. 221. The 1976 Act's adoption of the life-plus-50-year term was thus a prerequisite for the United States to accede to the Berne Convention, which it finally did on March 1, 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

47. H.R. REP. No. 1476, *supra* note 33, at 135.

48. *Id.* at 136.

49. *Id.*; *see also* text accompanying notes 76-79 *infra*.

50. H.R. REP. No. 1476, *supra* note 33, at 134.

51. *Id.*

balance differently than it had in 1909, concluding that "too short a term harms the author without giving any substantial benefit to the public."

> The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains the dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.[52]

On balance, the drafters concluded that the benefits of a life-plus-fifty-year term outweighed the potential harms.[53] The 1976 Act's single term thus implemented the 1909 Act's goal of granting copyright for an author's entire lifetime but rejected the 1909 Act's policy of regulating the term of copyright according to the commercial value of the work.[54]

C. *The Libertarian Lockean View*

How would a libertarian Lockean such as Nozick view the length and structure of the copyright term under the 1909 and 1976 Acts? An argument can be made that this theory of property would reject both systems' limitation of protection to a finite term of years and instead view an author as entitled to a perpetual copyright.

Nozick's theory of justice in acquisition includes what he calls a weak version of Locke's proviso:[55] A person's acquisition of a thing is not just "if the position of others no longer at liberty to use the thing is thereby worsened."[56] In a passage that suggests how he might view the issue of copyright term, Nozick explores the import of his proviso for patent protection:

> An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others). Furthermore, a known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it . . . . Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.[57]

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52. *Id.*

53. *Id.* at 136.

54. *See* GOLDSTEIN, *supra* note 16, § 4.9 (noting that the 1976 Act's provisions "depart from the . . . premise of the renewal provisions by allowing copyright to subsist for the entire life plus fifty year . . . term regardless of a work's lack of long-term commercial success").

55. Locke's "proviso" qualifies his proposition that a person has an exclusive right of property in anything which she removes from the state of nature and mixes with her own labor; the proviso holds that the proposition is true "at least where there is enough, and as good left in common for others." LOCKE, *supra* note 11, ch. V, § 27.

56. NOZICK, *supra* note 4, at 178.

57. *Id.* at 182.

Nozick thus justifies the finite term of a patent by his "weak" Lockean proviso: A perpetual patent right in the first inventor would worsen the position of potential subsequent independent inventors by not leaving "enough, and as good" for them, and thus would violate the proviso.

This rationale, though, offers far less justification for a finite copyright term than for a finite patent term, because of differences in both the subject matter and the scope of protection of these intellectual property regimes. Independent authorship of identical copyrightable works seems much less likely than independent origination of patentable inventions: "If Shakespeare had died as a child we should never have had *Hamlet*, but if Newton had died as a child we should certainly have calculus today."[58] Even if authors do independently create identical copyrightable works, or even substantially similar ones, Nozick's requirement that a previous author's copyright not deprive subsequent authors of the use of their works might be satisfied by the copyright doctrines of originality and of the idea-expression distinction, which have no patent counterparts, rather than by a finite term of protection.

To be copyrighted, a work must be original, but originality, the "*sine qua non* of copyright . . . . means only that the work was independently created by the author (as opposed to copied from other works)."[59] The originality requirement thus ensures that even if an author's work is identical to an earlier work, she would not be deprived of her copyright, provided that she truly produced the work independently. Judge Learned Hand's classic illustration of the originality requirement highlights the differences on this score between copyright and patent protection:

> [I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an "author" because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work.[60]

One might object that even with the originality requirement a perpetual copyright does not satisfy Nozick's weak proviso; each identical but independently produced work would be copyrightable, but no author could prevent others from using their own "versions." This result, however, would still be more favorable to authors (and their successors in title) than that under a finite copyright term, since a perpetual copyright allows the copyright owners, acting to-

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58. Bradley Efron, CAMPUS REP. (Stanford University, Palo Alto, Cal.), May 2, 1984, at 5-6, *quoted in* Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1123 (1986).

59. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citations omitted). On copyright's originality requirement generally, see GOLDSTEIN, *supra* note 16, § 2.2.1.

60. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (citations omitted); *see also* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 150-51 (S.D.N.Y. 1924) (L. Hand, J.) ("No one doubts that two directories, independently made, are each entitled to copyright, regardless of their similarity, even though it amount to identity. Each being the result of original work, the second will be protected, quite regardless of its lack of novelty.").

gether, to control all use of the work. Under a nonperpetual copyright regime, of course, the first work will fall into the public domain while the others are still under copyright, leaving the later authors with no way to prevent the public from copying the first work instead of theirs. Judge Hand acknowledged this effect of our finite copyright term on authors of identical works in his example, noting that the public "might of course copy Keats's" poem.[61]

Given the improbability of independent authorship of absolutely *identical* works (each of which would be copyrightable under the originality requirement), the more important question to ask in evaluating whether a perpetual copyright violates the proviso is whether one author's perpetual copyright prevents subsequent authors from using their own *similar* works. This question in turn raises the problem, noted above, of deducing the precise scope of an author's rights in her works from Nozick's libertarian Lockean principles. The idea-expression distinction in copyright law seems not only to save a perpetual copyright from violating the proviso, but also to suggest one answer to the question of which sticks an author has in the libertarian Lockean bundle. The potential clash between a perpetual copyright and the proviso is likely to be most acute where the similarity between two works is not in the particular expression but in the basic ideas used. If an author's story of a tragic attempt of star-crossed lovers to escape the prejudice of their families infringes on the perpetual copyright in *Romeo and Juliet*, the perpetual copyright would seem to violate Nozick's weak proviso: If Shakespeare had not created a work based on that idea, "sometime later someone else would have."[62] This violation, however, need not be remedied by abandoning the perpetual copyright term, since the idea-expression distinction would protect the second author's rights. Copyright protects only the expression in an author's work and anyone else remains free to use any ideas within the work, even those that originate with the author.[63] Thus, while Shakespeare's perpetual copyright in *Romeo and Juliet* subsisted, *West Side Story* would not infringe on the copyright held by Shakespeare's successors in title.[64] Libertarian Lockeanism might therefore allow for a perpetual copyright but limit the scope of an author's property right to the actual expression embodied in the work rather than allowing ownership of the ideas, either because ownership of the ideas would violate the proviso or be-

61. *Sheldon*, 81 F.2d at 54; *see also Fred Fisher, Inc.*, 298 F. at 150 (L. Hand, J.) ("Any subsequent person is, of course, free to use all works in the public domain as sources . . . No later work, though original, can take that from him.").

62. NOZICK, *supra* note 4, at 182.

63. 17 U.S.C. § 102(b) (1988) ("In no case does copyright protection . . . extend to any idea. . . . regardless of [its] form."); *Feist*, 499 U.S. at 344-45 (1991) ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.' ") (quoting Harper & Row, Publishers v. Nation Enterps., 471 U.S. 539, 556 (1985)). On the idea-expression distinction generally, see GOLDSTEIN, *supra* note 16, § 2.3.

64. "In literary works the unprotectible building block ideas will typically be the work's theme, plot and stock characters and settings, as well as small aggregates of words such as a work's title." GOLDSTEIN, *supra* note 16, § 2.3.1.1 (footnote omitted).

cause no author can truly be said to have "created" the ideas in accordance with the principles of just acquisition or just transfer.[65]

The originality requirement and the idea-expression distinction thus seem to allow an author to enjoy a perpetual copyright in her works without thereby worsening the position of subsequent authors in a way that violates Nozick's weak proviso. Nozick might therefore see no justification for limiting the copyright term, unlike the patent term, by adopting a "rough rule of thumb to approximate how long it would have taken" someone else to author the same work: Shakespeare and all subsequent authors of tales of ill-fated romance could simultaneously be protected in perpetuity.[66]

If Nozick's weak proviso does require a limited term for copyrights, as it does for patents, he would probably approve of the lengthening of the maximum term in both revisions (to fifty-six years in 1909 and to life plus fifty years in 1976). Both extensions were justified explicitly by the desire to ensure authors the lifetime ownership of their works. These changes would probably strike Nozick as bringing the protections of the positive law of copyright into closer harmony with the rights to which authors are entitled by their original acquisition of their works (though neither extension would be completely harmonious with libertarian Lockeanism to the extent it would require a perpetual copyright).

Nozick would also likely favor the 1976 Act's single term over the 1909 Act's bipartite term. The renewal system in essence divests an author of all rights in her work halfway through the maximum copyright term unless she affirmatively acts to comply with registration formalities. The justification offered for this divestiture is that any work not registered for renewal has lost its commercial value and therefore "deserves" no copyright protection.[67] Nozick would likely raise two objections to this system.

First, in Nozick's view, whatever rights an author has in her work she owns by virtue of just acquisition and just transfer. There is no apparent justification

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65. Of course, libertarian Lockeanism could also avoid violating the proviso by granting an author ownership of both her expression and ideas but only for a finite term.

66. Some evidence suggests that the common law recognized a copyright that entitled an author, or her assignees, to the "sole right of printing and publishing [a literary composition] in perpetuity," Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 656 (1834); *see also* Donaldsons v. Becket, 98 Eng. Rep. 257 (H.L. 1774) (holding that such a right once existed). Early authorities in both England and the United States, however, held that the introduction of statutory copyright limited that common law right; once a work was published the author was entitled only to the protection of statutory copyright (assuming the author had complied with the necessary formalities). *Wheaton*, 33 U.S. at 591 & n.1.; *Donaldsons*, 98 Eng. Rep. at 262.

If Nozick's entitlement theory requires a perpetual copyright, his theory would obviously conflict with the Copyright Clause of the Constitution, which allows Congress to grant a monopoly to authors and inventors only "for limited Times." U.S. CONST. art. I, § 8, cl. 8.

A perpetual copyright also requires a justification for extending copyright in a work beyond its author's death. Libertarian Lockeanism might argue that the right to dispose of one's property at death is included within the fundamental ownership rights that a person acquires through acquisition or transfer. A libertarian might instead argue, however, that the Lockean premise that entitles an author to ownership of her works is a principle regarding the relationship of the laborer and the product of her labor, and since that relationship ends with the laborer's death, the Lockean justification for the author's ownership of her works also ends with her death.

67. *See* note 35 *supra* and accompanying text; *see also* H.R. REP. No. 2222, *supra* note 32, at 14.

for the minimal state to condition the continuance of an author's ownership on compliance with registration formalities, since such formalities do not seem necessary to enforce contracts or to protect against force, theft, or fraud.[68] Renewal formalities under the 1909 Act imposed "[a] substantial burden and expense"; resulted "in incalculable amounts of unproductive work"; and, perhaps most important for Nozick, "[i]n a number of cases . . . [were] the cause of inadvertent and unjust loss of copyright."[69] Nozick likely would disapprove of a system in which an author's property rights in her work subsist for only half as long as they otherwise would simply because the author has failed to file the appropriate paperwork with the government.

More significantly, Nozick would probably challenge the proffered justification for splitting the copyright term in two: measuring the term of copyright according to a work's commercial value. First, this rationale assumes that a work without commercial value in the twenty-eighth year of copyright will have already exhausted its commercial value. But a work might just as plausibly lack commercial value in the twenty-eighth year because its importance has not yet been recognized,[70] and a work that has exhausted its initial commercial value might later enjoy a revival of interest.[71] Denying further protection to a work that lacks commercial value in the twenty-eighth year thus seems arbitrary and may reflect a model of a creative work's commercial value as similar to that of a mineral deposit that is extracted at a steady rate until it is exhausted, a model that may not correspond to all, or even most, copyrightable works.[72] Second, Nozick might not accept the exclusive focus on commercial value, since copyright entitles an author to ownership of more than just the economic exploitation of a work.[73] For example, in a legal system without the moral

68. This also suggests that Nozick would prefer the 1976 Act, which vests in an author a copyright in her work from the moment it is "fixed in any tangible medium of expression," 17 U.S.C. § 102(a) (1988), as opposed to the 1909 Act and its predecessors, which conditioned even the initial term of copyright ownership on compliance with registration formalities. The 1976 Act's provisions concerning the recordation of transfers (and the priority of such transfers over unrecorded transfers) might be justified in Nozick's minimal state as necessary mechanisms for the enforcement of contracts and the prevention of fraud, along the lines of marketable title acts for land.

69. H.R. REP. No. 1476, *supra* note 33, at 134.

70. *See id.* ("A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.").

71. Silverman v. Sunrise Pictures Corp., 273 F. 909 (2d Cir. 1921), illustrates how apparently valueless creative works can acquire new commercial value through technological advancements. *Silverman* involved the 1915 renewal of a copyright by the next-of-kin of a deceased author, whose estate had closed before the original term expired. The opinion "noted . . . as the real reason for this litigation, that until after the estate was closed no one thought the copyright worth renewing. Value has been given to this and many other old copyrights, and the rights thereto, by the growth of the moving picture and photo play industry." *Id.* at 912.

72. Consider an analogous situation with regard to land. Imagine a speculator who buys a parcel of land hoping it will someday increase in value. Suppose that the speculator's hopes are not immediately realized and at the end of 28 years the parcel has in fact declined in value, perhaps to the point where there are no buyers for it, rendering it commercially valueless. Surely Nozick would not accept the proposition that simply because the land has no current commercial value the speculator should be required to take affirmative acts to continue her ownership of the parcel.

73. In fact, an author may choose to forgo all commercial value in the work, without diminishing her ownership of the copyright. "[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright

right recognized in many civil law countries, copyright may be an author's primary means of artistic control over her work.[74] Third, "Congressional hostility [during consideration of the 1909 Act] to a long, indeterminate term for all works"[75] and the legislators' insistence on "provisions . . . aimed at putting ephemeral works in the public domain after 28 years"[76] demonstrate that the drafters of the 1909 Act recognized that copyrighted works had *some* value to the public, even when they were "of no pecuniary value to the owners."[77] As one proponent of the bipartite term wrote, "there is some intrinsic value to the public in a portion of the copyrighted material after it has lost all pecuniary value to the author or his assignee."[78] Nozick's principles seem to admit no justification for requiring an author to surrender her work to the public without compensation for whatever "nonpecuniary" use the public intends to make of it.

The traditional justification for making works freely available to the public, either when an author fails to renew her copyright or when the term expires, is that copyright protection exists only to encourage authorship and thereby provide creative works to the public. Nozick, of course, would reject this view of copyright: Whatever rights an author has in her works derive not from a government scheme of incentives but from her creation of those works in accordance with the principles of justice in acquisition and in transfer. A renewal system designed to thrust creative works quickly into the public domain thus cannot be seen as a payment which society can legitimately demand in return for the copyright monopoly it grants authors; rather, Nozick would view this system as an illegitimate means for society to expropriate rights that belong to authors. Nozick's rejection of copyright as a balance designed both to encourage authorial creativity and to ensure public access to the fruits of that creativity suggests that while he would likely view the 1976 Act's adoption of the single term as a significant improvement over the old renewal system, he

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owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." Stewart v. Abend, 495 U.S. 207, 228-29 (1990) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

74. United States copyright law is one of "several state and federal doctrines [that] at least partially approximate individual aspects of moral right." GOLDSTEIN, *supra* note 16, § 15.23. "[T]he exclusive right to prepare derivative works[ ] approximates a right against distortion, . . . the exclusive rights of reproduction, distribution, performance and display approximate the right against disclosure[, and t]he right of withdrawal . . . has a weak counterpart in the Copyright Act's termination of transfer provisions." *Id.*

Consider one possible use of copyright to control artistic integrity:

> [Jo Sullivan] Loesser [widow of Frank Loesser] said she had made it her task to police her husband's artistic legacy for authenticity. . . .
>
> In the revival of "Guys and Dolls" that closed recently, she said, she caught a changed line involving the color of Sky Masterson's tie and made the director restore the original.
>
> "I've seen 'Showboat, performed childless, and with twins," interjected [James] Hammerstein [son of Oscar Hammerstein II].
>
> "I've seen 'South Pacific' set in an insane asylum," said [Mary] Rodgers [daughter of Richard Rodgers].

Blumenthal, *supra* note 34, at C13. In each of these instances, the authors' successors can prevent what they see as distortions of these works, if they own the copyrights, by refusing to license such productions or by conditioning licenses on their artistic approval.

75. Ringer, *supra* note 35, at 122.

76. *Id.*

77. *See* note 36 *supra.*

78. Ames Letter, *supra* note 35.

would disapprove of much of the reasoning behind that change, which remained focused on a work's commercial value and on the competing interests of authors and the public.

D. *The Rent-Theory Lockean View*

A rent-theory Lockean's evaluation of the copyright term's length and structure primarily requires determining not what ownership rights an author acquires through her creation of a work, the issue that concerns libertarian Lockeans such as Nozick, but rather what ownership rights justice requires the state to grant. In contrast to the very sketchy details of a libertarian Lockean entitlement given in Nozick's *Anarchy, State and Utopia*, Hale's work provides a fairly clear outline of what property rights the state should grant to private individuals. According to Professor Fried,

> [Hale's] Lockean labor theory of property rights—which is at root a *cost* theory of entitlement—justified ownership of that portion of exchange value that represented a fair price for the sacrifice actually incurred. But, Hale argued, contrary to the frequent assumption of laissez faire advocates, it justified no more than that. . . . [If, as society had acknowledged in regulating formal monopolies,] the justification for regulating monopoly profits was that the producer had realized a gain disproportionate to his sacrifice, the same logic would argue for appropriating that portion of gain in competitive markets that reflected returns in excess of true costs.[79]

For Hale, then, the copyright term should allow an author to exploit a work long enough to extract that portion of its value required to compensate her for production costs, and allow society to capture any value beyond those costs.[80]

If asked to choose between the 1909 Act's bipartite term and the 1976 Act's unitary term, Hale would likely prefer the former because of its mechanism for varying the length of a work's protection based on its commercial value.[81] The renewal system's primary attraction for Hale would be that it thrusts the majority of works into the public domain after only twenty-eight years, while the 1976 Act guarantees every work a minimum term of fifty years and offers a much longer maximum term than the 1909 Act's fifty-six years. The renewal system seems more consistent with what Professor Fried describes as Hale's "general program for revising property rights to secure the maximum equality consonant with adequate incentives to produce."[82] One obvious way to implement Hale's program and secure "equality" of property rights in creative works is to move works into the public domain at the earliest possible date, making

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79. FRIED, *supra* note 5 (manuscript ch. 4, at 7).

80. Hale's acceptance of the need for incentives explains why his theory would not suggest outright abolition of copyright in order to give the public immediate access to all works. *See* Hale, *supra* note 28, at 39 ("A certain degree of inequality of property rights seems essential if the pecuniary incentives to production are to be maintained.").

81. In speculating on Hale's preference, I evaluate the choice between the two systems only on the issue of varying the length of protection relative to the protected work's commercial value. Hale's preference for the bipartite term might give way to other advantages of the single term (such as the ability that term offered the United States to join international copyright conventions).

82. FRIED, *supra* note 5 (manuscript ch. 3, at 4).

them available for anyone to use without paying the author or copyright owner. Considering the number and quality of literary, cinematic, and pictorial works produced between 1909 and 1978,[83] the 1909 Act's two-term system certainly seems to have provided sufficient incentive (including the *possibility* of fifty-six years of copyright protection) for the production of copyrightable works, while at the same time putting 85 percent or more of copyrighted works into the public domain after twenty-eight years.[84]

Hale would likely object to the length of copyright protection under both the 1909 and 1976 Acts, at least insofar as its purpose is to give an author the benefit of lifetime protection. In both 1909 and 1976, the drafters defined the appropriate allocation of a copyright's value between author and public by allowing an author to extract any value from the work during her entire lifetime.[85] The bare assertion that authors are entitled to a copyright in their works into their old age and beyond seems unlikely to persuade Hale, given the "more exacting separation of the individual and social components in the creation of wealth" that rent-theory Lockeanism demands.[86] Authors, Hale would conclude, are entitled only to recover their production costs.

An insistence on an absolutely exacting separation would require the copyright term to vary with each work, lasting only long enough to repay the author's costs for producing that particular work.[87] Hale, though, would no doubt recognize the impossibility of administering such an exacting system and would accept the need for a generally applicable term that would approximate the appropriate term for each work, though protecting some works too long and others not long enough. Since any value in a copyrighted work beyond that needed to compensate an author for her sacrifice belongs, according to rent-theory Lockeanism, to the community as a whole "to be appropriated and redistributed as it [sees] fit,"[88] society could allow some authors—those whose works produce, before the copyrights expire, income sufficient to reward their sacrifice—to retain the surplus, treating this overpayment as the price of a workable copyright system, the existence of which furthers the public interest by encouraging the production of creative works. If some authors fail to re-

83. The 1909 Act went into effect on July 1, 1909, § 64, 35 Stat. at 1088, and the 1976 Act become effective on Jan. 1, 1978, 90 Stat. at 2598.

84. *See* note 35 *supra*. Of course, one could object that the system's benefit to the public is illusory, since renewal affords a work protection for 56 years, and any work with enduring commercial value is likely to be in the minority of works that are renewed and therefore not shared equally by the public after 28 years. While the most commercially successful works no doubt would be renewed, as noted above, a work not commercially valuable enough for the author to deem worth renewing is not necessarily without any value (for example, to scholars, to high school drama and choir directors seeking material for their students, to directors and scriptwriters in search of plots to film or stage, to channel surfers desperate for an old movie or a rerun of a favorite sitcom episode, to radio stations looking to fill air time, and so on). *See* text accompanying notes 76-79 *supra*.

85. *See* notes 32 & 42 *supra* and accompanying texts. Neither Act actually adopted a term that corresponded precisely to the author's lifetime, despite the ease with which such precision could be achieved. The failure to adopt a pure life-of-the-author term may reflect the need to satisfy a variety of rationales simultaneously in fixing the copyright term.

86. FRIED, *supra* note 5 (manuscript ch. 3, at 6).

87. The two-term renewal system can be seen as a very crude mechanism toward this end, since it did provide for a minimal variation in the term for which different works were covered.

88. FRIED, *supra* note 5 (manuscript ch. 3, at 6).

cover their production costs before the copyrights on their works expire, the generally applicable term would not result in the rent theorist's ideal allocation of property rights, but this deviation would probably be seen as an unfortunate byproduct of an administrable copyright system's need for a uniform, rather than an individualized, term. Hale would probably want Congress to choose a term that minimizes both overcompensation and undercompensation of authors. The author's lifetime certainly *might* be the appropriate approximation of the average period needed for an author to recover her production costs, but those who have set the term have never asserted that justification or presented any empirical evidence to support it. Hale might thus challenge the fifty-six-year or life-plus-fifty-year terms as allocating too much of a creative work's value to its authors and too little to the community as a whole.

III. Reversion of Copyright Interests to Authors

A. *The 1909 Act*

In addition to regulating the length of protection an author could claim for her works, the 1909 Act's renewal system also included a reversionary feature. The original copyright term could be secured by a work's author or its "proprietor," one to whom an author had sold the copyright in the work.[89] The renewal copyright, however, could generally be secured only by "the author . . . if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin."[90] This provision meant that if, for example, an author had sold her copyright to a publisher for the original term, the author could regain ownership of the copyright, to the exclusion of the publisher, by filing for the renewal term.[91] In effect, the "renewal" term was not a renewal at all; rather than merely extending the duration of the original copyright, it granted a "new estate," in the terminology of some courts, to the author or her designated successors.[92]

89. Act of Mar. 4, 1909, ch. 320, § 8, 35 Stat. 1075, 1077. A "proprietor" was also the person statutorily entitled to copyright posthumous works, composite works, works by corporate bodies, and works made for hire.

90. § 23, 35 Stat. at 1080. Renewal for posthumous works, composite works originally copyrighted by a proprietor, works copyrighted by corporate bodies, and works made for hire could be secured by the original copyright proprietor. *Id.*

91. This reversion was not an innovation of the 1909 Act. The Statute of Anne had provided that upon the expiration of the original 14-year term, "the sole Right of Printing or Disposing of Copies shall *Return* to the Authors thereof, if they are then Living for another Term of Fourteen Years." 8 Anne, ch. 19 (1710) (emphasis added). *But see* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 648 (1943) (stating that English courts construed the Statute of Anne as giving the renewal term to the assignees rather than the author). The 1790 Copyright Act received a similar interpretation. *See* White-Smith Music Pub. Co. v. Goff, 187 F. 247, 249-50 (1st Cir. 1911). The 1831 Copyright Act, however, "broke up the continuity of title, and gave the right of renewal to the [author's] widow or child or children. . . . Here, then, was an entirely new policy, completely dissevering the title, . . . and vesting an absolutely new title eo nomine in the persons designated." *Id.* at 250 (citations omitted). The 1909 Act continued this policy.

92. *See, e.g.*, Shapiro Bernstein & Co. v. Jerry Vogel Music Co., 115 F. Supp. 754 (S.D.N.Y. 1953) (stating that the renewal copyright is a new estate, granted free of all rights, interests, or licenses transferred under the original copyright), *rev'd on other grounds*, 221 F.2d 569, 570-71 (2d Cir. 1955);

The 1909 Act embraced the renewal term as a separate property interest in order to benefit authors, albeit at the expense of their assignees. Senator Reed Smoot and Representative Frank Currier, who chaired the committees responsible for revising the copyright laws, "were attracted by renewals as a device for allowing the author's interest to revert to him and his family."[93] At the 1908 hearings on copyright revision, Representative Currier dramatized his support for this mechanism with an anecdote about Mark Twain:

> Mr. Clemens told me that he sold the copyright for Innocents Abroad for a very small sum, and he got very little out of the Innocents Abroad until the twenty-eight-year period expired, and then his contract did not cover the renewal period, and in the fourteen years of the renewal period he was able to get out of it all the profits.[94]

Representative Currier's views persuaded his committee colleagues:

> [The] committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, [the] committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.
>
> . . . In the comparatively few cases where the work survives the original term the author ought to be given an adequate renewal term. In the exceptional case of a brilliant work of literature, art, or musical composition it continues to have a value for a long period, but this value is dependent upon the merit of the composition. Just in proportion as the composition is meritorious and deserving will it continue to be profitable, provided the copyright is extended so long; and it is believed that in all such cases where the merit is very high this term is certainly not too long.[95]

This expression of solicitude for authors, which motivated the bipartite term's reversionary aspect, had two principal dimensions. First, legislators wanted to protect authors against potentially bad bargains in the sale of their works' copyrights. Barbara Ringer, the Register of Copyrights from 1973 to 1980, has noted that "[i]t has often been said that the renewal provision was based on 'the familiar imprudence of authors in commercial matters,' " but she finds no support for this idea in the legislative history: "There is more evidence of a Congressional recognition that author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position."[96] The decision to allow reversion only after twenty-eight years reveals the drafters' perception both that valuation problems created a bargain-

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Shapiro, Bernstein & Co. v. Bryan, 27 F. Supp. 11, 13 (S.D.N.Y. 1939) (holding that the right of renewal is a new grant and not an extension of the original term); Southern Music Pub. Co. v. Bibo-Lang, Inc., 10 F. Supp. 975 (S.D.N.Y. 1935) (same). *See also* note 109 *infra.*

93. Ringer, *supra* note 35, at 119.

94. *Pending Bills to Amend and Consolidate the Acts Respecting Copyright: Hearings Before Committees on Patents,* 60th Cong., 1st Sess. 20 (1908) (statement of Rep. Currier).

95. H.R. REP. No. 2222, *supra* note 32, at 14.

96. Ringer, *supra* note 35, at 125 (footnote omitted).

ing disadvantage primarily for the exceptional author whose work "later proves to be a great success" and that the valuation problem in these "comparatively few cases" uniformly deprived authors of value they had created, value "dependent upon the merit of the composition." Second, when an author did not survive to the end of the original term, legislators wanted any value of a work in the renewal term to accrue to the author's dependent relatives: The author was free to bequeath the renewal term as she chose *only* if she left no surviving spouse or children.[97] The Act attempted to accomplish these two goals by making the renewal term a separate estate granted to the author free of any transfers covering the original term and by listing those entitled to the renewal-term copyright, free of an author's assignments, if the author died before the end of the original term.

Two important questions about these legislative goals, and the renewal system's implementation of them, fell to the courts under the 1909 Act. The first concerned the free alienability of the renewal-term copyright during the original term. The Supreme Court held in *Fred Fisher Music Co. v. M. Witmark & Sons*[98] that the 1909 Act did not bar an author from assigning her renewal interests before she renewed the work's copyright.[99] The Court found the statute silent on the issue of alienability, but, after considering the legislative history and judicial interpretations of the 1909 Act and its predecessors, concluded that the Act's basic policy rationale for the renewal provision was to "enable[ ] the author to sell his 'copyright' without losing his renewal interest," and held "that an assignment by the author of his 'copyright' in general terms did not include conveyance of his renewal interest."[100]

The Court, however, rejected the argument that the 1909 Act's legislative history demonstrated a congressional intent to protect authors from poor bargains for their works and that the inalienability of the contingent renewal interest was necessary to implement that intent:

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97. § 23, 35 Stat. at 1080; H.R. REP. No. 2222, *supra* note 32, at 15. This purpose also apparently motivated the provisions in earlier copyright laws that entitled authors and their heirs to the renewal term. The 1790 Act granted a renewal only if the author was living at the expiration of the original term. The drafters of the 1831 Act noted in their committee report that under the 1790 Act an author's copyright expired in the fourteenth year if the author was dead, "although, by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them." 7 CONG. DEB. app. cxix. The 1831 Act sought to remedy this situation by providing that either an author or his "widow, or child, or children" could claim a renewal-term copyright, § 2, 4 Stat. 436, 436 (1831). The 1870 Act continued the practice, allowing a deceased author's "widow or children" to renew at the end of the original 28-year term. § 88, 16 Stat. 198, 212 (1871).

98. 318 U.S. 643 (1943).

99. Later decisions made clear that an author could assign only a contingent expectancy interest, which vested only if the author survived to the time for renewal. Should the author die before that time, the assignee would take nothing, since the right to renew would vest in the author's statutorily designated successors. *See* Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 378 (1960) ("Until [the time for registration of renewal rights] arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. . . . Like all purchasers of contingent interests [a purchaser of such an interest] takes subject to the possibility that the contingency may not occur."); De Sylva v. Ballentine, 351 U.S. 570, 574 (1956) (noting that "the author, during his lifetime, could make a binding assignment of the *expectancy* in his future rights of renewal") (emphasis added).

100. *Fred Fisher Music,* 318 U.S. at 653-54 (citing Pierpont v. Fowle, 19 Fed. Cas. 652 (C.C. Mass. 1846)).

> The policy of the copyright law, we are told, is to protect the author—if need be, from himself—and a construction under which the author is powerless to assign his renewal interest furthers this policy. We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld. . . .
>
> It is not for courts to judge whether the interests of authors clearly lie upon one side of this question rather than the other. If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius. Even if we could do so, we cannot say that such men would regard with favor a rule of law preventing them from realizing on their assets when they are most in need of funds. . . . We do not have such assured knowledge about authorship . . . as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.[101]

As a result of the Court's holding, under the 1909 Act an author's express assignment of her renewal rights during the initial copyright term "is valid against the world" if the author survives until the renewal period begins.[102] If the author dies before that time, though, her statutorily designated beneficiaries, in the order listed in the Act, are entitled to the renewal-term copyright free of any attempted assignment by the author.[103] Although the intent of the 1909 Act's drafters regarding the alienability of renewal-term interests is perhaps unknowable,[104] the *Fred Fisher Music* decision clearly undermined one goal of the reversionary mechanism: protecting an author from the consequences of her poor initial bargaining position by securing any long-term value of a work to her rather than to her assignees.

Despite the Supreme Court's ringing endorsement in *Fred Fisher Music* of an author's freedom to sell her renewal interest, courts continued to enforce what might be termed a weak inalienability of renewal interests in the form of a presumption against inferring an intent to transfer a renewal interest unless the author's grant included an express statement of such intent.[105] "By requiring the express mention of renewal rights in such transfers, thus avoiding an inad-

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101. *Id.* at 656-57.

102. *Miller Music Corp.*, 362 U.S. at 375.

103. *Id.* at 376.

104. At least one commentator has attributed the *Fred Fisher Music* decision to "Congress' failure to make itself clear one way or the other on this crucial point." Ringer, *supra* note 35, at 161.

105. *See, e.g.*, Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., 255 F.2d 518, 521 (2d Cir. 1958) ("[A] general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention."), *cert. denied*, 358 U.S. 831 (1958); Rossiter v. Vogel, 134 F.2d 908, 911 (2d Cir. 1943) ("[T]he circumstances justifying the transfer of the right of renewal must be stronger than those justifying the transfer of the copyright, since the right of renewal is separate from the original copyright."); Philipp v. Jerome H. Remick & Co., 145 F. Supp. 756, 758 (S.D.N.Y. 1936) ("[D]oubt . . . should be resolved in favor of the [author]. The clearest language is necessary to divest the author of the fruits of his labor."). The Court in *Fred Fisher Music* had recognized this presumption: "By providing for two copyright terms, each of

vertent or unintended transfer of such rights, the courts . . . found a means of carrying out the statutory policy of protecting the copyright interests of original authors and certain of their heirs."[106]

The second question regarding reversion that faced the courts concerned the effect of an author's renewal on derivative works produced under license during the original term. The 1909 Act gave the copyright owner the sole right to authorize derivative works, such as translations, dramatizations or novelizations, musical arrangements or adaptations, and so on, based on the original work.[107] A derivative work's author was entitled to a copyright as well, but that copyright protected only the second author's original contributions to the derivative work and not any of the first author's expression already protected by the underlying work's copyright.[108] As early as 1937, courts held that since the renewal term was a "new estate,"[109] a license for the creation of a derivative work did not authorize the licensee to continue to use the underlying work once the licensing author renewed her copyright.[110] A case involving a dispute over the film rights to the opera *Madame Butterfly* and to the novel on which it was based explains the rule:

> It is true that the expiration of [the author's] copyright of the novel did not affect the [licensee's] copyright of so much of the opera as was a "new work" and entitled to be independently copyrighted as such. But the [licensee] has acquired no rights under [the author's] renewal of the copyright on his novel and the [licensee's] renewal copyright of the opera gives it rights only in the new matter which it added to the novel and the play. It follows that the [licensee] is not entitled to make general use of the novel for a motion picture version of [the author's] copyrighted story; it must be restricted to what was copyrightable as new matter in its operatic version.[111]

The effect of this rule, particularly in combination with an author's inability to convey more than a contingent interest in the renewal copyright, was drastic, as the facts of *Stewart v. Abend*[112] illustrate. The case concerned Alfred Hitchcock's successful and acclaimed 1954 film *Rear Window*, based on Cornell Woolrich's short story *It Had To Be Murder*. Hitchcock and Jimmy Stewart, the film's lead actor, purchased the film rights in the story for both the original

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relatively short duration, Congress enabled the author to sell his 'copyright' without losing his renewal interest." 318 U.S. at 653-54.

106. Rohauer v. Friedman, 306 F.2d 933, 935-36 (9th Cir. 1962); *see also* Ringer, *supra* note 35, at 163-64 ("[I]n cases where the renewal is not covered by the language of the assignment, the courts [were] reluctant to uphold the transfer in the absence of clear and convincing extrinsic evidence of an intention to convey.").

107. § 1, 35 Stat. at 1075.

108. § 6, 35 Stat. at 1077; *see also* McCaleb v. Fox Film Corp., 299 F. 48, 49 (5th Cir. 1924); Edmonds v. Stern, 248 F. 897, 898 (2d Cir. 1918); Glaser v. St. Elmo Co., 175 F. 276, 277-78 (S.D.N.Y. 1909).

109. *See, e.g.*, Silverman v. Sunrise Pictures Corp., 273 F. 909, 913 (2d Cir. 1921); White-Smith Music Pub. Co. v. Goff, 187 F. 247, 249 (1st Cir. 1911); *see also* note 92 *supra*.

110. *E.g.*, Fitch v. Shubert, 20 F. Supp. 314, 315 (S.D.N.Y. 1937) ("[A]ll rights which the [licensees] acquired . . . expired when the copyright for the original term expired in 1928 and when a new grantee appeared as owner of the Fitch play for the renewal term.").

111. G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469, 471 (2d Cir. 1951) (citations and footnotes omitted).

112. 495 U.S. 207 (1990).

and renewal terms.[113] But Woolrich died intestate before the original copyright expired, causing the renewal right to vest in his executor, who renewed the copyright in 1969 and subsequently assigned it to Abend.[114] When *Rear Window* was publicly distributed in the late 1970s, Abend sued for copyright infringement and won, with the Supreme Court holding that Woolrich's death prior to the vesting of the renewal rights left Hitchcock and Stewart with only an unfulfilled expectancy interest in the film rights for the renewal term and that an assignee of renewal rights in such a position "may continue to use the original work only if the author's successor transfers the renewal rights to the assignee."[115]

B. *The 1976 Act*

Despite its adoption of a unitary term, the 1976 Act continued the 1909 Act's policy of providing authors, or their statutorily designated successors, with a second chance to exploit their works' commercial value by replacing the bipartite term's reversionary mechanism with a right of termination of transfers.[116] The termination right makes an author's intervivos grant of a copyright interest terminable by the author (or, if the author is deceased, by the author's surviving spouse and/or children) during the period between thirty-five and forty years after the grant's date of execution.[117] The transfer-termination provisions actually strengthen both dimensions of the 1909 Act's reversionary mechanism: the protection of authors against potentially bad bargains in the initial sale of rights to works whose success proves long-lived and the right of a deceased author's dependents (rather than an author's assignees or even her own designated beneficiaries) to such a work's long-term value.[118]

The continuity of the reversionary policies of the two Acts emerges clearly from the legislative history and an analysis of the statutory text. The primary rationale advanced for section 203 was the need to protect authors against bad bargains: "[T]he proposed law should . . . safeguard[ ] authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of deter-

113. *Id.* at 212.

114. *Id.*

115. *Id.* at 221.

116. 17 U.S.C. § 203 (1988); *see also id.* § 304 (1988 & Supp. V 1993). Section 203 covers grants executed on or after January 1, 1978, while § 304 covers grants executed before January 1, 1978. As the provisions of § 304 are primarily transitional, I will refer principally to § 203 and will not elaborate on the differences between the two sections. For a detailed explanation, see GOLDSTEIN, *supra* note 16, § 4.10.1-.3. To date, however, virtually all case law on termination of transfers under the 1976 Act to date has involved § 304, since a transfer involving a post-1977 grant cannot be terminated before January 1, 2013. *See id.* § 4.9.2.2-.3; COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 1616 (1984).

117. The full details of the provisions are rather complex. For example, a party terminating a right must serve notice on the owner of that right during a period of not more than 10 and not fewer than two years before the effective date of the termination, and that service of notice vests the "future rights that will revert upon termination" in the party terminating the transfer. 17 U.S.C. § 203(a)(4), (b)(2) (1988). For a detailed analysis of the provisions, see GOLDSTEIN, *supra* note 16, § 4.9-.10.

118. *See* notes 93-97 *supra* and accompanying text.

mining a work's value until it has been exploited."[119] Thus, the 1976 Act's drafters transformed the need to protect authors against bad bargains into the primary policy behind the transfer-termination provisions, and also explained, as the 1909 Act's legislative history had not, that this need was premised not on a perception of authors as poor businesspeople, but on a perception of creative works as inherently difficult to value before exploitation in the market.[120]

The 1909 Act's policy of providing for an author's dependents by entitling them to any long-term value of a work is implicit in the assertion in the legislative history of the 1976 Act that the "56-year term is not long enough to insure an author *and his dependents* the fair economic benefits from his works,"[121] but is explicit in the statutory text, which grants the termination right to a deceased author's surviving spouse and children.[122] In fact, the 1976 Act's termination provisions embody the concern for dependents even more strongly than did the 1909 Act's renewal provisions, since the former grant termination rights *only* to surviving spouses and children, while the latter granted the right to renew to spouses, children, executors (on behalf of legatees), or next of kin. This more limited list of beneficiaries suggests that the 1976 Act's drafters saw the termination right not as a property right of the author, who was free to dispose of it as she saw fit *unless* her disposition would deprive her immediate survivors of the reverted rights, but rather as a means of support for authors and their immediate families, which would not be granted at all if none of those persons were alive at the appropriate time.

Congress also addressed the questions of alienability and derivative works, in both cases adopting a different result than the courts had under the renewal system. Section 203(a)(5) makes the transfer-termination right inalienable: "Termination of [a] grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[123] The legislative history clearly announces the effect of this provision: "[A]lthough affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away."[124] The statute goes even further in limiting an author's (or her successors') ability to contract out of the termination right, providing that "[a] further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only

119. H.R. REP. No. 1476, *supra* note 33, at 124. The transfer-termination provisions in § 304 for works already under copyright in 1978 (the effective date of the 1976 Act) allow the termination not only of grants made by the author but also of grants of renewal interests made by her statutory successors, including grants of contingent future interests in a renewal copyright. Again, the justification was to free the grantor from bad bargains: "After the present 28-year renewal period has ended, a statutory beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term." *Id.* at 141.

120. *See* text accompanying notes 93-95 *supra.*

121. H.R. REP. No. 1476, *supra* note 33, at 134 (emphasis added).

122. 17 U.S.C. § 203(a)(1)-(2) (1988). As with the renewal interest under the 1909 Act, a surviving spouse and/or children acquire the termination right free from any agreement the deceased author may have made regarding termination. *Id.* § 203(a)(5).

123. *Id.* § 203(a)(5).

124. H.R. REP. No. 1476, *supra* note 33, at 125.

if it is made after the effective date of the termination."[125] Inalienability comports fully with the rationale for the termination right: An author's poor bargaining position at the outset of the copyright term might allow a purchaser not only to pay a lower price than the author could obtain if the work's value were foreseeable with certainty, but also to extract a promise from the author not to terminate the grant under section 203.[126]

The 1976 Act also "overruled" the courts on the effect of reversion on derivative works produced during the initial term.

> A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.[127]

The legislative history explains the anticipated operation of this section: "[A] film made from a play could continue to be licensed [by the film's author] for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off."[128] Thus, under the transfer-termination regime, if Cornell Woolrich's successors had terminated his grant of film rights in the story *It Had To Be Murder*, Alfred Hitchcock and Jimmy Stewart would still have had the right to license *Rear Window* for public exhibition under the terms of the original grant;[129] if the author of the novel *Madame Butterfly* had terminated his grant of operatic and film rights to Puc-

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125. 17 U.S.C. § 203(b)(4) (1988). The legislative history describes this provision as an attempt "to avoid the situation that has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation." H.R. REP. No. 1476, *supra* note 33, at 127. An exception in this section provides that an agreement to make a further grant is valid if it is made between the person terminating the grant and the original grantee (or her successor in title) *and* if it is made after notice of termination has been served; the legislative history describes this exception as "in the nature of a right of 'first refusal.' " *Id.*

126. The 1976 Act's legislative history does suggest one limited and rather cumbersome way in which authors, though apparently not their successors, can circumvent the inalienability of the termination right: "Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running." H.R. REP. No. 1476, *supra* note 33, at 127. In effect, then, an author could "sell" her termination right by entering into a new contract with her assignee that terminated the previous assignment and regranted the same rights again.

127. 17 U.S.C. § 203(b)(1) (1988). The drafters of the 1976 Act acknowledged that this is "[a]n important limitation of the rights of a copyright owner." H.R. REP. No. 1476, *supra* note 33, at 127.

128. H.R. REP. No. 1476, *supra* note 33, at 127.

129. Since Woolrich in fact died intestate, he would have had no statutory successor entitled to terminate the grant to Hitchcock and Stewart.

Commentators have noted that the derivative-work exemption to termination will pose significant questions of interpretation:

> Is a motion picture producer to be limited to prints on hand, or will it be free to make new copies for exhibition purposes? . . . Should the motion picture producer be free to edit its film to meet the changing time, commercial format, and censorship requirements of television, or will this constitute the unprivileged "preparation of other derivative works"?

GOLDSTEIN, *supra* note 16, § 4.9.3.2. Another significant issue involves § 203(b)(5)'s statement that termination will "in no way affect rights arising under any other federal, state or foreign laws." Producers of derivative works may acquire rights under trademark and unfair-competition laws to a work's title and characters that could "stymie[ ]" efforts by the terminating party to exploit the terminated rights. *Id.* § 4.9.3.3.

cini, Puccini's successors could still have licensed public performances of the opera but could not have produced a film version.

The mechanics by which an author's multiple successors can exercise their termination rights (or make a new grant of the terminated rights) represent a complete departure from the law and practice under the 1909 Act. When both a spouse and one or more children survive an author, the spouse gets a 50 percent interest in the termination right, and the children (together with the surviving children of any deceased child of the author) share a 50 percent interest, "divided among them and exercised on a per stirpes basis."[130] Only "the person or persons who . . . own and are entitled to exercise a total of more than one-half of [the] termination interest" can terminate a transfer, and any "further grant . . . of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners."[131] When such a majority exercises its right of termination, the terminated rights revert to everyone owning a termination interest, not only the members of the majority; similarly, a further grant of such a reverted right by a majority of its owners is "effective with respect to all of the [owners] including those who did not join in signing it."[132] So while the termination provisions vest in a deceased author's successors a property interest in the terminable and the terminated rights, they own and can exercise that interest only collectively. This significantly departs from traditional copyright co-ownership, in which joint owners can individually assign their proportionate interests in the copyright and individually grant nonexclusive licenses to use the copyrighted work (though an exclusive license can only be granted jointly by all owners of the copyright).[133]

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130. 17 U.S.C. § 203(a)(2)(c) (1988). For ownership of the renewal copyright by surviving spouses and children under the 1909 Act, see GOLDSTEIN, *supra* note 16, § 4.8.2.1.b.

131. 17 U.S.C. §§ 203(a)(1), 203(b)(3) (1988). The legislative history illustrates the mechanics of the system.

> Take for example, a case where a dead author left a widow, two living children, and three grandchildren by a third child who is dead. The widow will own half of the reverted interests, the two children will each own 16 2/3 percent, and the three grandchildren will each own a share of roughly 5 1/2 percent . . . . Consistent with the per stirpes principle, the interest of a dead child can be exercised only as a unit by majority action of his surviving children. Thus, even though the widow and one grandchild would own 55 1/2 percent of the reverted copyright, they would have to be joined by another child or grandchild in order to effect a termination or a further transfer of reverted rights.

H.R. REP. No. 1476, *supra* note 33, at 125-26. Given the possibilities for intrafamily conflict, the 50/50 split between a surviving spouse and children, together with the majority-rule principle for exercising termination rights, will sometimes lead to a deadlock that prevents an author's successors from exercising their termination (or further grant) rights and realizing any value from these rights. *See, e.g.*, Stone v. Williams, 970 F.2d 1043, 1061-66 (2d Cir. 1992); De Sylva v. Ballentine, 351 U.S. 570, 580-82 (1956) (involving litigation over the right of authors' children born out of wedlock to share the renewal or termination rights with authors' widows and marital children).

132. 17 U.S.C. § 203(b), 203(b)(3) (1988). The majority that makes a further grant need not be the same majority that terminated the transfer. H.R. REP. No. 1476, *supra* note 33, at 127.

133. "[C]oowners of a copyright [are] treated generally as tenants in common, with each coowner having an independent right to use [or] license the use of a work, subject to a duty of accounting to the other coowners for any profits." H.R. REP. No. 1476, *supra* note 33, at 121. On the general rights and liabilities of joint owners, see GOLDSTEIN, *supra* note 16, § 4.2.2.

Section 203 imposes the same system of collective ownership of termination rights on joint authors as well as their successors by applying the same "majority-rule" provisions to joint authors' terminations of grants and further grants of reverted rights. *See* 17 U.S.C. § (203)(a)(1) (1988).

C. *The Libertarian Lockean View*

Libertarian Lockeanism's grounding of property rights in an author's labor might suggest that theorists such as Nozick would approve of the 1909 and 1976 Acts' provisions allowing authors to recover rights in their works. In fact, though, these features would be unlikely to win Nozick's approval, since although they might accord with an author's just acquisition of her work, they would likely interfere with Nozick's (unformulated) principle of justice in transfer.

The rationale offered for reversion in both 1909 and 1976 was the perceived need to protect authors from their disadvantageous bargaining position relative to copyright purchasers.[134] Nozick should view this rationale for reversion as wholly illegitimate, for he clearly rejects such paternalism: "[T]he state may not use its coercive apparatus . . . in order to prohibit activities to people for their *own* good or protection."[135] He would likely view any congressional attempt to protect "congenitally irresponsible" authors from their own bad bargains in the same way the majority did in *Fred Fisher Music*: "While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law."[136]

Nozick seems just as likely to reject this protective rationale as illegitimate if it is based on a perception not of the author as inept bargainer but of the copyrightable work as, "unlike real property and other forms of personal property, . . . by its very nature incapable of accurate monetary evaluation prior to its exploitation."[137] Assuming that a copyrightable work is impossible to value accurately before exploitation, this impossibility disadvantages authors and their potential assignees equally. In making a transfer, an author takes a risk that the price received will prove to be less than the true value of the rights sold, while the buyer takes the opposite risk that the price paid will prove to be more than the rights are worth. The minimal state should have no role in allocating these risks, since they reflect no force, fraud, or theft; the parties should make the allocation themselves in the transaction. The illegitimacy of allowing authors to escape the consequences of contracts that later prove unremunerative would no doubt be apparent to Nozick in the one-sidedness of the provisions: Neither renewal nor termination allows an *assignee* to recover from an author when the assignee has made an unremunerative purchase and paid more than the rights acquired proved to be worth. Nozick thus would likely regard the reversion of rights to an author as an expropriation of the assignee's justly acquired property.[138]

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134. H.R. REP. No. 1476, *supra* note 33, at 124; H.R. REP. No. 2222, *supra* note 32, at 14.

135. NOZICK, *supra* note 4, at ix.

136. 318 U.S. 643, 657 (1943).

137. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02, at 9-30 (1994).

138. The practical effect of renewal and termination provisions may not be particularly significant, provided all parties are aware of the provisions. For example, if one seeking to buy a copyright interest from an author knows that she may lose that interest at the end of 28 or 35 years, the price the buyer is willing to pay will reflect a discount for the likelihood that the right will be lost. Similarly, any investment a buyer makes in exploiting a purchased interest would be made with knowledge of the potentially

In addition to disrupting the contractual allocation of property rights and risks between an author and her assignees, reversion also may allow an author to take from her assignees property that they have created through their own labor. While the 1909 Act's drafters asserted that any commercial value remaining in a work at the end of the first period of copyright protection derived from the author's talent and labor,[139] Nozick might well contest this assertion as undervaluing the contributions that an author's assignees make to a work's long-term value. While a work whose merit endures through the centuries might indeed do so primarily or even solely because of its author's genius, such "classic" quality seems far less likely to emerge after the relatively short initial copyright period of either twenty-eight or thirty-five years. Indeed, in the case of many books and films, the promotion, distribution, merchandising, and related efforts by the publisher or studio may contribute substantially to maintaining demand for the work, thereby extending its commercial value beyond the initial period of copyright protection. Allowing an author to recapture *all* of a work's long-term value in order to remedy an alleged initial disparity in bargaining power thus deprives the author's assignees not only of property to which they are entitled, irrespective of whether they have added posttransfer value, because they acquired it in a just transfer from the author, but also of the value of their contributions to the work, to which they are entitled by just acquisition through their mixture of labor with the work.

Reversion also seeks to ensure that a deceased author's surviving dependents, not her assignees, will enjoy the long-term value of a work. Nozick would no doubt object to this feature for the same reasons he would dislike the basic reversionary provisions: It expropriates from the assignee property she has acquired through just transfer and it minimizes the assignee's contributions to the work's long-term value.[140] Even if Nozick somehow found the reversion of rights to authors consistent with his principles of justice, he surely would fault the statutory designation of successors to a deceased author's reversion interest because it prevents an author from disposing of that interest as she wishes. Of course, if she wants to ensure that, in the event of her death, her surviving spouse and/or children acquire her renewal or termination interest, the statutory designation of successors presents no conflict. If, however, an author wishes to bequeath her renewal or termination interest to someone other than a surviving spouse or child, the Copyright Acts override her wishes and force her to bequeath her interest to the statutorily defined successors.[141] The

limited time horizon in which to recover that investment. In such circumstances, the reversion of the sold interest to the author might be seen not as the expropriation of a property right of the buyer but merely as the failure of a contingent interest, which is the only interest an informed buyer could have expected after 28 or 35 years.

139. H.R. REP. No. 2222, *supra* note 32, at 14 ("[T]his value is dependent upon the merit of the composition.").

140. Again, to the extent buyers understand the copyright system and adjust their purchase prices to account for the possibility that an author's successor will renew free of prior transfers or will terminate prior transfers, characterizing the purchaser's loss of copyright interest as expropriation seems problematic, since the purchaser in effect had no more than a contingent interest.

141. *See, e.g.*, Larry Spier, Inc. v. Bourne Co., 953 F.2d 774 (2d Cir. 1992) (permitting a deceased author's widow and surviving children to terminate his transfer of the renewal interests despite the

Supreme Court in fact described the statutory definition of successors in the 1909 Act as "a compulsory bequest of the copyright to the designated persons,"[142] and the succession provisions of the 1976 Act's transfer-termination right only strengthen this compulsion: While the 1909 Act at least provided that an author's devisees could inherit the renewal right if the author was not survived by a spouse or children, the 1976 Act grants a deceased author's termination right *only* to a surviving spouse and/or children.[143] No Nozickian principle justifies divesting an author of the liberty to bequeath her renewal or termination right. Similarly, the property interest that the renewal or termination provisions grant to a surviving spouse and/or surviving children, whether seen as depriving either an author of the free alienation of her labor-desert rights or as depriving an assignee of a purchased property right, does not appear to be acquired in accordance with the principles of justice in acquisition or justice in transfer.[144]

The presumption against alienation of renewal interests under the 1909 Act and the express inalienability of the termination right under the 1976 Act also pose problems for libertarian Lockeanism. The presumption against transfer of renewal rights in the absence of an express statement of such transfer might not trouble Nozick, at least if the parties know of the presumption and can therefore behave accordingly when contracting for the sale and purchase of copyright interests. Since the minimal state would already protect an author from being defrauded of her renewal term by an unscrupulous purchaser, however, Nozick might prefer that the court determine in each case whether the parties intended to transfer renewal rights, rather than presuming that they did not so intend if they did not expressly use the word "renewal." There seems to be no justification for requiring authors and their assignees to parrot form language in their contracts.

The absolute inalienability of an author's termination right under the 1976 Act would probably trouble Nozick much more.[145] Barring an author either from selling her right to terminate a grant in its thirty-fifth year or from contracting in advance to regrant the rights she will recover at that time appears to

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author's testamentary intent to provide for his mistress, whose income from the renewal interest would be cut off by the termination); Saroyan v. William Saroyan Found., 675 F. Supp. 843 (S.D.N.Y. 1987) (rejecting the argument that because the author was estranged from his children, his intent to bequeath his renewal rights should prevail). Professor Nimmer summarizes the effect of the statutory designation of beneficiaries of the renewal or termination right this way: "An author in effect is required by statutory mandate to leave the right to obtain renewals to his widow and children if he has any." NIMMER, *supra* note 137, § 9.04, at 9-63.

142. De Sylva v. Ballentine, 351 U.S. 570, 582 (1956).

143. This curtailment of successors obviously strikes particularly harshly at single authors, at authors who are predeceased by their spouses and/or children, and at gay and lesbian authors who can neither legally marry their spouses-in-fact nor provide for them through a bequest of the termination right in their wills.

144. If it were, Nozick would probably object to the 1976 Act provisions that allow a beneficiary to exercise her interest in terminable or terminated rights only through the action of the majority of the holders of the termination right, as well as to the binding effect of such majority action on minority holders of the termination right, since he would see no justification for conditioning the beneficiary's exercise of dominion over her termination right on the action of her co-owners.

145. Again, this assumes Nozick would accept that the termination right should exist at all.

be a pure constraint on what an author may do with her property. Nozick requires that in the minimal state such constraints be set "by the Lockean rights people possess,"[146] and since an author's alienation of her renewal or termination interest would not seem to make anyone worse off (as Nozick defines that concept), there appears to be no such constraint in the minimal state. Again, Nozick is likely to agree with the majority in *Fred Fisher Music* and regard the inalienability of termination interests as "a rule of law preventing [authors] from realizing on their assets when they are most in need of funds."[147] Indeed, Nozick might view inalienability provisions as a simple expropriation of the author's property. For example, a terminally ill author of a commercially successful work would no doubt object to copyright law's solicitude for ensuring her ability to terminate her transfers at some future date by denying her the right to sell that termination right today.[148]

Nozick would probably view the derivative-works exception to an author's transfer-termination rights as remedying one of the more egregious flaws of the 1909 Act's renewal system. In the derivative-work context, Nozick's view of reversion as expropriation is particularly clear, since the author of the underlying work gains property produced by her assignee's labor. Reversion deprives the derivative-work author not only of property held in accordance with the principle of justice in transfer—the right to use the underlying work in the derivative work—but also of property held in accordance with the principle of justice in acquisition—the intellectual property that the derivative-work author creates by mixing her mental labor with external resources to create the derivative work. Nozick would no doubt find it ironic that the 1909 Act simultaneously recognized this property (by extending copyright protection to the derivative-work author's original contributions to the derivative work) and virtually ensured that the derivative-work author would lose this property after twenty-eight years. Of course, reversion does not deprive her of legal title to her original contributions to the derivative work, but she will as a practical matter be unable to exploit those contributions, since her use would infringe the renewal-term copyright in the underlying work. As a result, the underlying work's author will be in a position to extract from the derivative work's author some portion of the latter's property in the derivative work. Nozick would view the effect of the 1909 Act's reversionary system as, in essence, allowing the state to expropriate a portion of the derivative-work author's property and

146. NOZICK, *supra* note 4, at 171.

147. 318 U.S. 643, 657 (1943).

148. A terminally ill author who expects to be survived by a spouse and/or child might prefer to sell her termination right in a way that will bind her survivors in order to obtain a higher price than her contingent interest would command, but she can perhaps take some comfort in knowing that her survivors will obtain some of her work's value when the termination right vests. By contrast, an unmarried and childless gay author who is dying of AIDS would likely be particularly unhappy about his inability to capitalize currently either on his contingent termination right, since the statutory provisions on successors mean that *no one* will *ever* be able to realize the value of his termination interest, despite the inalienability provisions' "protection" of that interest from his current desire to sell it.

transfer it to the underlying work's author (or her successors).[149] There is clearly no justification for this forcible transfer of property in the minimal state.

This expropriation underscores one of Nozick's more general objections to copyright reversion: By promoting an author's ability to capture all of a work's long-term value, the law understates other people's contributions to that value. Just as a publisher's marketing efforts may be responsible for creating much of a book's value over twenty-eight or thirty-five years, a successful derivative work can stimulate or revive demand for the underlying work. As one commentator observed, "The movie *Rear Window* became a selling point for anthologies containing the Woolrich story. The musical play *Cats* no doubt sent many people who dimly remembered *The Love Song of J. Alfred Prufrock* as the chief, if not the only *oeuvre* of T.S. Eliot to the bookstore for *Old Possum's Book of Practical Cats*."[150]

From Nozick's point of view, the 1976 Act's derivative-work exception to an author's termination-transfer right is a marked improvement to an undesirable system. By providing that a derivative-work author may continue to use her work even if the underlying work's author (or her successor) terminates the original license for the production of the derivative work, the Act prevents the terminating author from "holding up" a derivative-work author and extracting a portion of the latter's property. Still, Nozick would likely view the exception as imperfect. First, it is unclear how broadly courts will interpret a derivative-work author's right to use the derivative work.[151] More fundamentally, the derivative-work exception only changes the *effect* of a termination on a derivative work and does not prevent an author from terminating the original transfer. Nozick would object that such a termination violates property rights to which the derivative-work author is entitled by virtue of her acquisition in accordance with the principle of justice in transfer. Both the 1976 Act and its legislative history make clear that the distinction between not granting an author any termination right and mitigating the effect of termination on a derivative work is not just formal but extremely practical: A derivative work produced under the original grant may continue to be used, "but this *privilege* does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant."[152] For example, "a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off."[153] The cutting off of the remake rights in this example would surely trouble Nozick; the licensee paid the original author not

149. Professor Goldstein has described the derivative-work exception to the 1976 Act's transfer-termination provisions as seeking to "preserv[e] the incentive to produce derivative works free from *the obligation to pay additional tribute* to the original author or her successors that will *rob* the derivative work of the value of its independent contributions." GOLDSTEIN, *supra* note 16, § 4.9.3.2 (emphasis added).

150. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1147 (1990).

151. *See* note 129 *supra*.

152. 17 U.S.C. § 203(b)(1) (1988) (emphasis added).

153. H.R. REP. No. 1476, *supra* note 33, at 127.

merely for the right to make and use a derivative work, but also for the right to make subsequent versions of that work, and the termination provisions allow the original author (or her successor) to force the licensee to return that right after thirty-five years, even if the contract provided that the right should extend for the life of the copyright.[154]

In the end, Nozick's main objection to the reversionary mechanisms of both the 1909 and 1976 Acts would seem to be that they effectively prevent the transfer of a copyright interest for longer than twenty-eight or thirty-five years by making any transferred copyright interest contingent at the twenty-eight- or thirty-five-year point.[155] Consider an author's grant under the 1976 Act: The grantee can own the transferred interest outright for thirty-five years, but after that time the grantee's ownership becomes contingent upon the termination right not being exercised. The author owns a right of reversion in the transferred interest, but that right is contingent on her surviving until the twenty-fifth year after the transfer (at which point she can serve notice of termination and thereby vest the reversion right in herself). Any spouse or child of the author also owns a right of reversion in the transferred interest, contingent on surviving the author before the author exercises the termination right *and* before the termination period has expired, and on mustering the majority needed to exercise the termination right. And the inalienability provisions make it impossible for anyone to consolidate these contingent interests before the termination right becomes exercisable so as to secure absolute ownership of the right beyond the thirty-fifth year. Even if Nozick is willing to accept some limit on the duration of the copyright term, it seems doubtful that he would find any justification for a twenty-eight- or thirty-five-year limit, or even a limit of twenty-eight or thirty-five years plus some further contingent term.

D. *The Rent-Theory Lockean View*

Reversion would likely pose fewer problems for a rent-theory Lockean such as Hale. The drafters of both Acts asserted that reversion was necessary at least in part to protect an author from entering into a disadvantageous contract due to her poor bargaining position at the outset of the initial copyright term. Hale would certainly view the legislature as empowered to define the contours of an author's property rights so as to protect the author's ability to exercise those

154. Again, the practical effect of this provision may be nil *if* all parties know the rules, since purchasers will know that they can buy at most the right to remake the derivative work for 35 years (perhaps with a contingent right to do so for the rest of the copyright term, dependent on the author's or her successor's not terminating).

155. Actually, under the 1909 Act, the law effectively limited the existence of all copyright interests to 28 years, since even the original author had only an expectancy interest in the renewal term, contingent upon her survival to the renewal period. Under the 1976 Act's single term, an author's copyright is not so limited, since the termination provisions apply only to *transfers* of interest. An interest that has never been transferred, therefore, subsists as the author's property for her lifetime plus 50 years (and a bequest by the author of the 50-year term following her death is not subject to termination). Practically, of course, the only economic value of a copyright to most authors ordinarily derives from transferring copyright interests to others, and as soon as a transfer has been made, the statute essentially limits the interest to a fixed term of 35 years, gives the assignee ownership of the interest, and creates a number of contingency interests.

rights. Hale, a strong opponent of judicial interference with government attempts to reshape property rights, wrote that

> [just] because courts can do nothing to revise the underlying pattern of market relationships, it does not follow that other organs of government should make no attempt to accord greater freedom to the economically weak from the restrictions which stronger individuals place upon them by means of the coercive bargaining power which the law now permits or enables them to exert.[156]

This view does not dictate a particular answer to any question about property rights, but instead recognizes that finding such an answer requires "not a search for some objective fact, but . . . the adoption of a policy."[157]

Hale would probably view as perfectly legitimate a determination by a majority of representatives and senators, particularly in two Congresses separated by more than sixty-five years, that authors are generally in a poor bargaining position, either because of a lack of business acumen or because of the nature of intellectual property, and that therefore a grant of property rights to authors must be fashioned so as to prevent them from bargaining away their ability to exploit those rights without adequate compensation. Thus, Hale would no doubt view the grant to authors of the ability to recover any transferred rights as a legitimate legislative choice for implementing the decision to protect authors.[158]

The possibility that an assignee could lose her assigned rights after twenty-eight or thirty-five years seems unlikely to trouble Hale, given what Professor Fried terms his "redefinition of the market as a system of mutual coercion [that] depended upon the legal right to withhold [one's property] from others."[159] Hale himself illustrated market's basis in coercion by examining the sale of a pair of shoes: "The seller would not part with the shoes, or produce them in the first place, if the law enabled him to get the buyer's money without doing so, nor would the buyer part with his money if the law enabled him to obtain the shoes without payment."[160] As a result this coercion, "[n]o particular income is sacred merely because it is the result of 'free bargaining.' The coercion in which it originated is not necessarily less 'artificial' or 'arbitrary' or even 'confiscatory' than that which would take it away in whole or in part."[161] For Hale, the "free bargaining" in an author's initial assignment of her copyright would actually be the result of the omnipresent coercion of background constraints. The legislature would be free to decide that authors are subject to a particularly strong background constraint—the difficulty of valuing copyrightable works before their exploitation—and thus need special protection in the form of the ability to coerce assignees to pay a second time for continued use of the work.

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156. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625 (1943).

157. Hale, *supra* note 20, at 193.

158. As noted above, as long as the rules are known by all parties, no injustice is likely to result from either reversion system. *See* note 138 *supra*.

159. FRIED, *supra* note 5 (manuscript ch. 3, at 18).

160. Hale, *supra* note 156, at 604.

161. Hale, *supra* note 20, at 217.

Furthermore, Nozick's likely objection that reversion amounts to a state prohibition on an author's sale of any copyright interest for longer than twenty-eight or thirty-five years would meet with little sympathy from Hale, whose positivism focused "first on the law's decision whether to privatize [property] at all—that is, whether to create the right to invoke the state's powers to exclude others from its use—*and if so, on the limits it sets on that right.*"[162] The state is free to limit the world of possible transferrable copyright interests to those of twenty-eight or thirty-five years in length, since it need not have given authors any right at all to exclude others from using their works.

The other justification offered for reversion is the allocation of any long-term value of a creative work to an author or those seen by legislators as her dependents, rather than to her assignees. Hale might have little argument with this aspect of reversion insofar as it concerns the respective rights of authors and assignees. Rent-theory Lockeanism holds that an author and her assignee are entitled only to enough income from a creative work to compensate each for her production costs. In the case of a book, for example, the author would be entitled to earn income sufficient to pay for the value of the time she invested in writing the book and the cost of her materials,[163] as well as a fair return on her investment of those costs. If she sells a publisher the exclusive right to print and distribute paperback copies of the book, the publisher would be entitled to exploit that copyright license to recover the price of the license, the cost of producing the paperbacks,[164] and a fair return on its investment.

To the extent a copyrighted work produces any income beyond the amount needed to compensate an author and her assignees for their production costs, rent-theory Lockeanism considers that surplus as belonging to the community as a whole.[165] Legislative majorities, as representatives of the community, clearly act within their prerogative when they choose to allocate this surplus to the author rather than her assignees, or to those survivors of a deceased author that they view as most deserving, rather than to the author's own assignees or preferred beneficiaries. To the extent that the income a work generates in the initial copyright period fails to compensate an author and her assignees fully for their production costs, reversion seems problematic for rent-theory Lockeanism, since it allows an author to demand from her assignees a portion of the work's remaining value in order to attempt to recover the full value the sacrifice she made in creating the work. Congress might justify giving authors this second chance as a means of furthering copyright's goal of motivating authors to produce. Rent-theory Lockeanism, however, deems an author's assignees to be entitled to recover their costs as well, and since the public gets little benefit

162. FRIED, *supra* note 5 (manuscript ch. 3, at 14) (emphasis added).

163. These costs would include not merely the tangible inputs such as paper, computer diskettes, and so on, but also items such as travel expenses for research and perhaps even more intangible costs such as the proportion of her educational expenses allocable to the knowledge and skills she used in creating the work.

164. These costs would include both direct expenses such as those for setting the type, printing the copies, shipping the books to retailers, advertising the book, and so forth, as well as the proportion of the publisher's general expenses attributable to this particular book.

165. FRIED, *supra* note 5 (manuscript ch. 3, at 6).

from authors' works unless assignees such as publishers distribute those works, assignees seem to have an equal claim with authors to the opportunity to exploit a work after the initial copyright period in order to recover their production costs.

As noted above, however, Hale would likely recognize that administrative convenience requires a generalization about the length of the term required to recover a work's production costs.[166] If legislators found that the portion of a work's income generated in twenty-eight or thirty-five years generally compensates an author and her assignees for their costs, it could treat any value remaining in a work after that time as rent that it is free to allocate to authors or their successors, even though this might harm assignees in cases where the generalization is incorrect and a work's income in the initial copyright period fails to compensate an author and her assignees adequately.

Hale would likely object, however, to treating reversion exclusively as a question of the interests of authors and their assignees, as this view reflects insufficient consideration of the constituency most affected by reversion: the public at large as users of creative works. If the value of the work upon reversion to the author is an economic rent which the state can redistribute, then the question of whether that rent should be allocated to the author or to her assignees (or to an author's statutorily designated successors or self-designated beneficiaries) cannot even be asked without first deciding whether to allocate that rent to the public or to a single individual, that is, whether "to privatize it at all."[167] The drafters of the 1909 and 1976 Acts clearly felt that a work's long-term value should be privatized:

> If the work proves to be a great success and lives beyond the term of twenty-eight years . . . it should be the exclusive right of the author to take the renewal term. . . .
>
> In the exceptional case of a brilliant work of literature, art, or musical composition it continues to have a value for a long period, but *this value is dependent upon the merit of the composition.*[168]

Just as Nozick might argue that this view undervalues the contributions of an author's assignees to the work's value, Hale might argue that it undervalues the proportion of a work's long-term value attributable not to the contributions of its author or her assignees, but of the public. These contributions include "persistent and powerful, though subtle and obscure, government interventions"[169]

166. *See* text accompanying note 87 *supra.* In generalizing about the point at which a creative work's income becomes a surplus to which the community rather than the author or her assignees is entitled, Congress will need to consider that many a creative work will never generate enough income to compensate its author, and her assignees, for their sacrifices in its production. The income from a successful work therefore may have to compensate the author and her assignees not only for their production costs for that work, but also for those of their unsuccessful works, since they probably could not afford to continue to produce and distribute creative works if they could not use the supernormal profits from their successes to cover the financial losses of their failures. Thus, the generalization about the time needed to recover the costs invested by authors and assignees will need to reflect their aggregate investments in, and returns on, the production of creative works.

167. FRIED, *supra* note 5 (manuscript ch. 3, at 14).

168. H.R. REP. No. 2222, *supra* note 32, at 14 (emphasis added).

169. Hale, *supra* note 20, at 193.

and social forces that influence the "pre-existing exchange value" of intellectual property, just as they affect other commodities.[170] The government interventions that contribute to a copyrighted work's value include those that affect the economy in general,[171] as well as investments in what might be described as society's "intellectual infrastructure": funding for institutions (such as schools, museums, theaters, orchestras, etc.) that help create a demand for copyrighted works, licensing of the broadcast spectrum, and so on. The social forces that contribute to the value of creative works include what might be called the initial distribution of intellectual interests (which "skews demand for goods in the direction of the tastes of those with the greatest purchasing power"[172]), the tastes of influential figures who shape which works are "canonized" at any given time, and pure chance, whose contribution to a work's value might be seen in the case of a biography of O.J. Simpson published in May 1994.[173] All these factors suggest that a work's long-term value may not be as exclusively attributable to "the merit of the composition" or the author's genius as the framers of the two most recent copyright acts have assumed, which suggests that any portion of a work's long-term value beyond that needed to compensate an author for her production costs should not be privatized at all.

Hale would likely be indifferent on the issue of the alienability of an author's reversion interest. At the least, he seems unlikely to take the disdainful view of the *Fred Fisher Music* Court, which saw inalienability as an unjustifiable attempt "to protect the author—if need be, from himself."[174] Rent-theory Lockeanism leaves legislators free to determine as a matter of policy that authors need to be protected from their poor bargaining positions, and therefore to fashion the grant of a property right to authors in a way that provides such protection. Since copyright, like all other property, depends on the state's decision to constrain some citizens' liberty for the benefit of other citizens, the state is free to limit citizens' ability to invoke its coercive power. For Hale, the decision about what limits to set, including limits on alienability, was "not a search for some objective fact" as to what limits "naturally" inhered in the property right in question, but rather required "the adoption of a policy."[175]

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170. Hale, *supra* note 25, at 259.

171. For a list of such factors, see FRIED, *supra* note 5 (manuscript ch. 3, at 15-17).

172. *Id.* at 16 n.55.

173. Hale wrote repeatedly about property whose value was due in some measure to fortuitous circumstances, emphasizing that an owner's Lockean labor rights cannot be said to entitle her to that chance value. *See, e.g.*, Hale, *supra* note 20, at 216 ("[I]ncomes for personal services do not by any means vary in proportion to sacrifice. They vary according to the good or bad fortune of the recipients in possessing capacities the market value of which is high or low."); *id.* at 212-13 ("If the supply [of a good] is limited through no fault of the owners, but by reason of natural conditions, there is the same ground for preventing the owner from getting the sole benefit [as where the supply is limited by the owners' immoral act in restraining competition]."); Robert L. Hale, *Rate Making and the Revision of the Property Concept,* 22 COLUM. L. REV. 209, 213 (1922) ("One man bought land very cheap around which a city has subsequently grown up, another inherited valuable property by will or by intestate succession.").

174. 318 U.S. 643, 656 (1943).

175. Hale, *supra* note 20, at 193. No matter how he felt about the merits of this policy decision, Hale would probably prefer the 1976 Act's express inalienability provisions because they resulted from an express legislative policy decision, while the alienability of reversion interests under the 1909 Act was a result of a judicial decision attempting to interpret legislative silence.

Answering that policy question might require considering that inalienability would prevent buyers from acquiring a copyright interest enforceable for longer than twenty-eight or thirty-five years and that inalienability would conflict with some authors' desires, or needs, to capitalize on their reversion interests currently, but those considerations would properly be balanced against others, such as the perception of authors' poor bargaining position in the sale of an unexploited work. In any case, neither an assignee limited to a twenty-eight- or thirty-five-year interest nor an author prohibited from selling her reversion interest could be said, in Hale's view, to have been deprived of anything to which she was entitled, since "legal rights . . . depend on the willingness of the state not only to enforce them, but to articulate them in the first instance."[176]

On the other hand, Hale would likely prefer the 1976 Act's resolution of the conflict between copyright reversion and the use of derivative works produced before the reversion. By allowing the derivative-work author to continue to use the work, the 1976 Act takes account of the interests of the public, interests Hale might have felt were largely ignored in shaping the reversion mechanisms. The judicial interpretations holding that, under the 1909 Act, a license to produce a derivative work determines at the end of the original copyright term, depriving the derivative-work author of any right to use the underlying work, certainly ignored those interests.[177] While the primary issue addressed by these interpretations concerns the allocation of value between the authors of the underlying and derivative works, the result may threaten the public, as the Supreme Court recognized in *Stewart v. Abend*:

> [S]ome owners of underlying work renewal copyrights may refuse to negotiate, preferring instead to retire their copyrighted works, and all derivative works based thereon, from public use. Others may make demands—like [Abend]'s demand for 50% of [Stewart's and Hitchcock's] future gross proceeds in excess of advertising expenses . . . which are so exorbitant that a negotiated economic accommodation will be impossible.[178]

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176. FRIED, *supra* note 5 (manuscript ch. 3, at 11). In addition, the change from the 1909 Act's alienability of contingent reversion interests to the 1976 Act's absolute inalienability of termination rights would involve no taking of property by the state, given what Hale saw as "the contingency of the particular arrangement of rights articulated by the state at any point." *Id.* at 26.

177. Of course, the license would not determine if the licensee had purchased the contingent right to use the underlying work during the renewal term *and* if the seller of that right (the author or one of her statutory successors) actually became entitled to renew the work in the 27th year.

178. 495 U.S. 207, 228 (1990) (quoting Brief for Columbia Pictures Industries, Inc. Et Al. As *Amici Curiae*). In a statement Hale would probably have approved, Justice O'Connor noted that "[t]hese arguments are better addressed by Congress than the courts." *Id.* She also noted, however, that it seems unlikely that many derivative works will go out of circulation due to an economic stalemate between the two authors, explaining that "an initially high asking price does not preclude bargaining. Presumably, [the owner of the copyright in the underlying work] is asking for a share in the proceeds because he wants to profit from the distribution of the work, not because he seeks suppression of it." *Id.*

Even if Justice O'Connor is correct about the practical implications of the author's recovery of the right to produce derivative works, Hale might still be troubled by the possibility that an author might simply want to withdraw works from circulation. Justice O'Connor notes that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Id.* at 228-29. This proposition of copyright law might make Hale uncomfortable, since it allows an author unilaterally to deprive the public of a copyrighted work, regardless of any social contribution to the value of the work.

Rear Window, for example, disappeared from movie and television screens for some years during resolution of the *Stewart v. Abend* conflict.[179] The 1976 Act eliminates the possibility that the public could be deprived of access to a derivative work through the reversion of licensed rights to the author of the underlying work. Given that some derivative works have become cultural icons,[180] with independent social meaning and value far beyond that needed to compensate the original and derivative-work authors for their production costs, Hale would likely prefer at the least that such works remain available to the public, as the 1976 Act allows, even if the authors remain able to extract a price for public use.

IV. CONCLUSION

Both the libertarian and rent-theory elaborations of Locke find some provisions of the 1909 and 1976 Acts on copyright duration and reversion acceptable and others unacceptable, although libertarians seem to have more objections to both systems than would rent theorists. Thus, the copyright systems created in 1909 and 1976 appear to reflect a theory of intellectual property that combines aspects of both views of property rights. The legislative and judicial theories underlying copyright in general, and the duration and reversion provisions in particular, more closely resemble both aspects of Robert Hale's rent-theory Lockeanism: Copyright is seen as owing its existence entirely to the congressional decision to allow authors to enforce exclusive ownership against the public and as extending no further than necessary to encourage authors to produce creative works. Nevertheless, legislators and judges craft and interpret that property right under the influence of a Nozickian intuition that an author, by virtue of mixing her labor with the resources of the world to create something new, enjoys "strong and far-reaching" entitlements to the work she creates, an intuition that may in large part explain the 1976 Act's adoption of a life-plus-fifty-year term, its retention of a reversion mechanism, and its strengthening of the inalienability of an author's reversion interest.

179. Francis M. Nevins, Jr., *Rx for Copyright Death*, 1977 WASH. U. L.Q. 601, 602 n.9.

180. Films such as *Casablanca* and *Gone with the Wind* might qualify as such works. Other examples might include the song *My Country 'Tis of Thee* and the musical *West Side Story*, though the underlying works in those cases—the music to *God Save the King* and Shakespeare's *Romeo and Juliet*—were already in the public domain at the time the derivative works were created.